TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1931~~ 1932

No. ~~819~~ 22

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, PETITIONER,

vs.

WINNIE BURTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 22, 1932

CERTIORARI GRANTED APRIL 18, 1932

(36,633)

(36,633)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 819

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, PETITIONER,

vs.

WINNIE BURTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 28, 1932

[fol. 1] [Captions omitted]

IN MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA

No. 209,724

WINNIE BURTON, 1315 Belmont Street N. W., Washington, D. C., Plaintiff,

vs.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, a Corporation, Chicago, Illinois; Branch Office, Carpenter Building, 10th and K Streets N. W., Washington, D. C., Defendant.

PARTICULARS OF DEMAND—Filed May 21, 1930

The plaintiff sues the defendant for Three Hundred Seventy-One Dollars ($371) with interest thereon from May [fol. 2] 22, 1929, for money payable by the defendant to the plaintiff, said amount representing the face value of the policy issued by the defendant to one Cady B. Burton, who dies May 22, 1929. Proper notices and proofs of death having been furnished to the said defendant and it having failed, neglected and declined to pay the same or any part thereof.

Wherefore the plaintiff brings this suit and claims of and from the defendant said sum of $371 with interest thereon from May 22, 1929, besides costs.

W. Gwynn Gardiner and George A. Maddox, Attys. for Plaintiff, 1102 Woodward Building, Washington, D. C.; Phone: National 5657, by George A. Maddox.

IN MUNICIPAL COURT OF DISTRICT OF COLUMBIA

FINDING OF THE COURT—June 9, 1930

Mins. 50, P. 49

Comes now the parties hereto and thereupon this cause being heard and submitted the Court finds in favor of the

plaintiff, the sum of Three Hundred seventy two dollars ($372) with interest from May 22, 1929.

In Municipal Court of District of Columbia

Judgment—June 14, 1930

Mins. 50, P. 63

It appearing under rule of Court that Judgment on the finding in this cause should be entered, it is so ordered. Wherefore, it is considered that plaintiff recover of defendant the sum of Three Hundred seventy two dollars ($372) with interest from May 22, 1929, and costs; and have execution thereof.

Further, defendant's counsel advises the Court that he may wish to apply for a Writ of Error and moves that the Court fix the maximum amount of an undertaking to operate as a supersedeas, and the Court thereupon fixes the same in the sum of Five Hundred dollars ($500).

[fol. 3] [File endorsement omitted]

In Municipal Court of the District of Columbia

[Title omitted]

Bill of Exceptions—Filed July 9, 1930

Be it remembered, that at the trial of the above case before Honorable Robert F. Mattingly, Judge of the Municipal Court of the District of Columbia, the plaintiff to maintain the issues on her part joined, introduced into evidence a certain policy of insurance dated the 12th day of December, 1927, whereby the defendant, The Washington Fidelity National Insurance Company, insured the life of one Cady Burton for the amount of Three Hundred and Seventy-two ($372.00) Dollars, the beneficiary named in said policy being the plaintiff herein. The said policy of Insurance contained, among other things, the following:

"In Consideration of the payment of the premium stated in the schedule on page 4 hereof, on or before each Monday, Doth Hereby Agree, subject to the conditions below and on page 2 hereof, each of which is hereby made a part of this

contract and contracted by the Insured and every person entitled to claim hereunder to be a part hereof, to pay upon receipt of proof of the death of the Insured, made in the manner, to the extent and upon the blanks required herein, and upon surrender of this Policy and evidence of premium payment hereunder, the amount stipulated in said schedule, to the executor or administrator of the insured, unless payment be made under the provisions of the next succeeding paragraph.

"The Company may make any payment or grant any non-forfeiture privilege provided herein to the Insured, husband or wife, or any relative by blood or connection [fol. 4] by marriage of the Insured, or to any other person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, or for his or her burial; and the production of a receipt signed by any one of said persons, or of other proof of such payment or grant of such privilege to any of them, shall be conclusive evidence that all claims under this Policy have been satisfied.

"The Conditions, Privileges and Concessions to Policyholders, Schedule on page 4 hereof, and any endorsement either printed or written as made by the Company, on any of the pages following are a part of this contract as fully as if recited over the signatures hereto affixed.

"In witness whereof the said Washington Fidelity National Insurance Company has, by its President and Secretary, signed and delivered this Policy on the date hereof as stated on page 4."

The Conditions on page 2 of the said policy are the following:

"This Policy constitutes the entire agreement between the Company and the Insured and the holder and owner hereof. Its terms cannot be changed, or its conditions varied, except by the express agreement of the Company evidenced by the signature of its President or Secretary. Therefore, Agents (which term includes also Managers and Assistant Managers) are not authorized and have no power to make, alter, or discharge contracts, to waive forfeitures or to receive premiums on Policies more than four weeks in

arrears, or to receipt for the same, and the payment to an Agent of any such arrears shall be at the sole risk of the person making such payment and shall not be credited as a payment upon the policy, whether receipt be given for such payment or not.

"If any premium under this Policy shall not be paid when due, the Policy shall lapse, subject to the provision for Grace Period and to the Non-Forfeiture Privileges as herein contained, and such lapse shall not be considered to have been waived by the Company in any respect by reason of the acceptance of overdue premiums upon this or any other Policy.

[fol. 5] "If, (1) the Insured is not alive or is not in sound health on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, unless such rejection, medical attention or previous disease is specifically recited in the "Space for Endorsements" on page 4 in a waiver, signed by the Secretary; or if (3) any Policy on the life of the Insured hereunder has been previously issued by this Company and is in force at the date hereof, unless the number of such prior Policy has been endorsed by the Company in the "Space for Endorsements" on page 4 hereof, (it being expressly agreed that the Company shall not, in the absence of such endorsement, be assumed or held to know or to have known of the existence of such prior Policy, and that the issuance of this Policy shall not be deemed a waiver of such last mentioned condition) then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud in which case all premiums will be forfeited to the Company.

"If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premiums paid hereon would have purchased at the correct age. If the Insured within one year from the date of issue hereof die by his own hand or act, whether sane or insane, the liability

of the Company hereunder shall be limited to an amount equal to the premiums which have been received, without interest.

"The Company assumes no obligation prior to the date hereof. Any assignment or pledge of this Policy or of any benefits hereunder shall be void and of no effect. In any settlement under this Policy, any indebtedness to the Company hereunder shall be deducted.

"Proof of death shall be made upon blanks to be furnished by the Company and shall contain the answer to each question propounded to the claimant, to physicians and to other persons, and shall contain the record, evidence, [fol. 6] and verdict of the coroner's inquest, if any be held. All the contents of such proofs of death shall be evidence of the facts therein stated in behalf of, but not against, the Company."

The Policy further provides thus:

"Incontestability.—This Policy shall be incontestable after it has been in force, during the lifetime of the Insured, for a period of two years from the date of its issue, except for non-payment of premiums, fraud or misstatement of age."

There was no endorsement on page 4 of the said policy and no copy of an application for the policy was attached thereto.

Further to maintain the issues the plaintiff offered in evidence the premium receipt books showing payments of premiums from the issuance of the policy until the time of the death of the insured which occurred on May 22, 1929. He also offered the Claimant's Certificate of Death and the Attending Physician's Certificate of Death and stated to the Court with the assent of counsel for the defendant that there was no controversy between the plaintiff and the defendant as to the fact of death, and that the company had declined to pay to the plaintiff the Three Hundred and Seventy-two Dollars ($372) as provided by the terms of the policy; that the insured, when insured, lived in the District of Columbia, and this policy was delivered to him in the District of Columbia where premiums due were paid. Plaintiff thereupon rested. Whereupon the defendant to maintain the issues upon its part to be maintained placed

upon the witness stand the Assistant Cashier of the Washington City Post Office who stated that he had appeared in answer to a subpœna duces tecum addressed to the Postmaster and had produced records showing the number of days of annual leave without pay and of sick leave which had been taken by the insured, Cady Burton, during the calendar years 1926, 1927, 1928, and the period from January 1, 1929, to May 22, 1929. The witness stated that he could from the records state the number of days each of annual leave, leave without pay and sick leave which the said Cady Burton had taken during the calendar years 1926, [fol. 7] 1927 and 1928, and the period from January 1, 1929 to May 22, 1929, inclusive. Counsel for the defendant asked the witness to examine the records and state to the Court the facts with reference to the leave taken by the said Cady Burton during the periods mentioned to which counsel for the plaintiff objected upon the ground that the defendant was apparently about to introduce a defense under the terms of the policy of insurance. Thereupon counsel for the defendant stated to the Court that the policy of insurance provided that if the insured was not in sound health at the date thereof the policy should not become effective and that he proposed to prove that at the date of the issuance of the policy sued upon the said Cady Burton was not in sound health. Counsel for the plaintiff thereupon objected to any proof being offered by the defendant of the unsound health of the insured on the ground that there was not attached to the policy a copy of the application therefor. Counsel for the defendant stated to the Court that he was making no defense based upon any application; that no application was in evidence and there was no evidence that there had been any written application for the policy in suit. Counsel for the plaintiff then stated that there was a written application, that it had been delivered to the company and no copy of the application had been attached to the policy delivered to the insured. Counsel for the defendant then stated that if that were the case the plaintiff should prove it, and the counsel for the plaintiff responded that the proof was for the defendant. The Court sustained the objection of the plaintiff, excluded the testimony offered and ruled that the defendant would not be permitted to introduce any evidence of the violation of any terms of the policy, to which rulings the defendant excepted. The de-

fendant thereupon stated to the Court that its entire defense was based upon the violation of the terms of the policy sued upon and the Court thereupon ruled that defendant could not be heard to make any such defense where a copy of the application had not been attached to and delivered with the policy. To which ruling defendant duly excepted. Thereupon the Court found for the plaintiff in the full amount claimed. And defendant in open Court gave notice of its intention to apply to the Court of Appeals for a writ of error.

[fol. 8] And the defendant by its attorneys requested the Judge presiding at the trial to sign, seal and make a part of the record this Bill of Exceptions, which is accordingly done, now for then, this 9th day of July, A. D. 1930.

Robt. E. Mattingly, Judge.

[File endorsement omitted.]

In Municipal Court of the District of Columbia

[Title omitted]

Assignment of Errors—Filed July 12, 1930.

Comes now the defendant, through its attorneys, and for Assignment of Errors says that the Court erred:

1. In refusing to admit any evidence on behalf of defendant of the insured's condition of health at the time of the issuance of the policy by defendant.

2. In excluding the testimony offered by defendant as to the number of days of annual leave, leave without pay, and sick leave taken by the deceased during the calendar years 1926, 1927, 1928 and 1929.

3. In refusing to admit evidence on behalf of the defendant that insured was not in sound health at the time the policy was issued.

4. In ruling that the defendant would not be permitted to introduce any evidence of the violation of any terms of the policy because no copy of an application had been attached to and delivered with the policy.

5. In entering a finding for the plaintiff.
6. In entering judgment for the plaintiff.

Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall, Attorneys for Defendant.

[fol. 9] [File endorsement omitted]

IN MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed July 12, 1930

The appellant (defendant) hereby makes the following designation of record for the Court of Appeals pursuant to the Writ of Error granted in the above-entitled cause:

1. Particulars of Demand.
2. Finding of the Court.
3. Judgment.
4. Bill of Exceptions.
5. Assignment of Errors.
6. This Designation.

Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall, Attorneys for Defendant.

IN MUNICIPAL COURT OF DISTRICT OF COLUMBIA

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Robert E. Mattingly, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Winnie Burton, Plaintiff, and Washington Fidelity National Insurance Company, a Corporation, Defendant, No. 209,724, a manifest error hath happened, to the great damage of the said Defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and [fols. 10 & 11] full and speedy justice done to the parties

aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 27th day of June, in the year of our Lord one thousand nine hundred and thirty.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

Allowed by

Josiah A. Van Orsdel, Associate Justice of the Court of Appeals of the District of Columbia.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 12] Minute entry of argument and submission, December 11, 1931, omitted in printing.

[fol. 13] In Court of Appeals of the District of Columbia

No. 5264

Washington Fidelity National Insurance Company, a Corporation, Plaintiff in Error,

v.

Winnie Burton, Defendant in Error

Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall, Washington, D. C., for appellant.

W. Gwynn Gardiner, George A. Maddox, Washington, D. C., for appellee.

Argued December 11, 1931. Decided January 25, 1932

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

OPINION

HITZ, Associate Justice:

This case is here upon writ of error to the Municipal Court of the District of Columbia.

Defendant in error was plaintiff there in an action against plaintiff in error, defendant there, upon a policy of insurance for $372, issued on the life of her late husband Cady Burton, who died in this District, May 22, 1929.

The policy was dated December 12, 1927, and plaintiff was the beneficiary designated therein.

The defense offered was that the insured was not in sound health at the date of the policy and, therefore that the company could, as therein provided, declare the policy void.

The trial court refused to hear any evidence to maintain that defense because no copy of the application for insurance had been delivered with the policy as provided by Sec. 657, Code, D. C. (now title 5, sec. 183, page 20), reading as follows:

"Copy of application to be delivered with policy: Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application. (March 3, 1901, 31 Stat. 1294, c. 854, sec. 657; June 30, 1902, 32 Stat. 534, c. 1329.)"

[fol. 14] Defendant contended its defense was not precluded by that section because its policy provided, "This policy constitutes the entire agreement between the company and the insured the holder and owner hereof.

And that it was not defending on the application or anything contained therein.

But if it was not defending on the application, as such, it was defending on something contained in or omitted from the application.

The section of the policy on which it relied to avoid its obligation read:

"If (1) the insured is not alive, or is not in sound health on the date hereof; or if * * * the insured * * * has, within two years before the date hereof, been attended by a physician for any serious disease or complaint, * * * then in any such case, the company may declare the policy void and the liability of the company in the case of any such declaration or in the case of any claim under the policy, shall be limited to the return of premiums paid on the policy, except in the case of fraud in which case all premiums will be forfeited to the company."

That policies of life insurance are issued upon applications containing applicant's version and representations as to those matters and things is common knowledge.

To the end that he, his beneficiary, and, if need be, the courts, might see exactly what he said in that connection, the statute provides that he, as well as the company, shall possess the entire contract. (Metropolitan Life Insurance Company v. Burch, 39 App. D. C. 405.)

And to accomplish that purpose it provides that unless the company delivers with the policy a copy of the application, no defense shall be allowed to such policy on account of anything contained in or omitted from the application.

That the defense in this case is upon something contained in or omitted from the application, there can be no doubt.

And the company can not avoid operation of the statute by including in its policy some statements of the application, while omitting the application itself. (Metropolitan Insurance Company v. Hawkins, 31 App. D. C. 498.)

Nor does the ex parte assertion of the policy that it alone constitutes the entire agreement between the parties alter the situation, for the statute intended to assist determination of rights under the policy by including therein the application therefor.

And where such an application has been made and acted upon but omitted from the policy, the statute precludes a

defense under the policy alone, if based upon matters to which the application relates.

The judgment is affirmed.

A true copy: Test:

—— ——, Clerk Court of Apeals, D. C.

[fol. 15] In Court of Appeals of District of Columbia

* * * * * * *

No. 5264, January Term, 1932

Washington Fidelity National Insurance Company, a Corporation, Plaintiff in Error,

vs.

Winnie Burton

Judgment—Jan. 25, 1932

In Error to the Municipal Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Municipal Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court in this cause be and the same is hereby affirmed.

Per Mr. Justice Hitz.

[fol. 16] In Court of Appeals of District of Columbia

[Title omitted]

Præcipe for Transcript of Record—Filed Feb. 15, 1932

The Clerk will please prepare a transcript of the record in the above entitled cause, including therein the following:

1. The Printed Record.
2. Minute Entry showing Argument.
3. Opinion of the Court.

4. The Judgment.
5. This Designation.
6. Clerk's Certificate.

Walter C. Clephane, Walter C. Clephane, 1512 H St. N. W.; J. Wilmer Latimer, J. Wilmer Latimer, 1512 H St. N. W.; Gilbert L. Hall, Gilbert L. Hall, 1512 H St. N. W., Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 17] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 18] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 18, 1932

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,633. District of Columbia Court of Appeals. Term No. 819. Washington Fidelity National Insurance Company, petitioner, vs. Winnie Burton. Petition for a writ of certiorari and exhibit thereto. Filed March 22, 1932. File No. 36,633.

FILE COPY

FILED
MAR 22 193
CHARLES

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. [redacted] 22

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, PETITIONER,

vs.

WINNIE BURTON.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
GILBERT L. HALL,
Counsel for Petitioner.

( )

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Western and Southern Life Ins. Co. v. Weber, 183 Ky. 32	13

Other Authorities Cited.

2 Cooley's Briefs on Insurance, 2d Ed., p. 1091, 31 Stat., C. 854, Sec. 657, p. 1294	15
D. C. Code, Sec. 657 (Title 5, Sec. 183 of the Code of the District of Columbia, 1930 Ed.)	2, 6
1 Joyce on Insurance, 2d Ed., Secs. 190, 190 (q)	15
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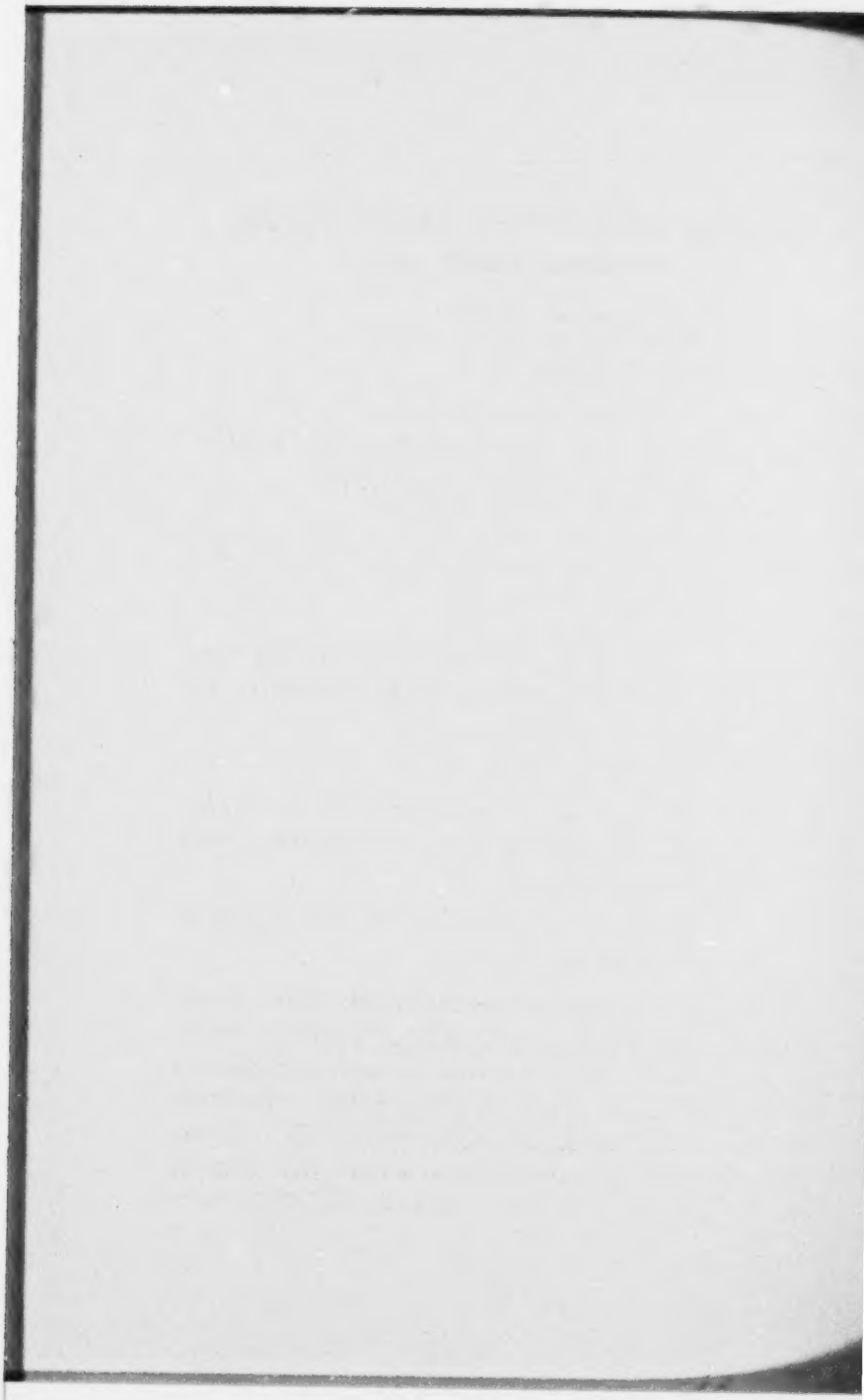

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1931.

No.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, PETITIONER,

vs.

WINNIE BURTON.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows and represents unto your Honors that:

1. Respondent sued in the Municipal Court of the District of Columbia upon a policy of insurance issued by petitioner in December, 1927, to and upon the life of respondent's husband, in which policy respondent was named as beneficiary. The amount claimed was three hundred and seventy-one dollars and interest (R. 1). Insured died in May, 1929 (R. 6). At the trial,

the Municipal Court, notwithstanding a stipulation in the *policy* that if insured was not in sound health at the date thereof the insurer might declare the policy void (R. 5), rejected all evidence offered by petitioner tending to prove that insured was not in sound health at the time the policy was issued, *on the ground that such evidence was incompetent under the statute quoted below* (R. 6, 7). Judgment against petitioner was thereupon entered (R. 2).

2. On writ of error from the Court of Appeals of the District of Columbia, the ruling of the Municipal Court in excluding the offered evidence was assigned as error (R. 8). The judgment of the Municipal Court was affirmed by the Court of Appeals on January 25, 1932 (R. 14).

3. The statute under which the evidence offered by petitioner was excluded is Section 657 of the D. C. Code (now Title 5, Sec. 183 of the Code of the District of Columbia, 1930 Ed.), as follows:

> "COPY OF APPLICATION TO BE DELIVERED WITH POLICY,—Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy *on account of anything contained in, or omitted from, such application.*" (Italics supplied.)

4. No defense was made or attempted to be made by petitioner "on account of anything contained in, or

omitted from, such application" (R. 7). There was, in fact, no copy of an application attached to the policy (R. 6); no reference therein to a written application, and no evidence at the trial that there had been a written application therefor (R. 7), and the policy itself contained a specific recital that it constituted "the entire agreement between the company and the insured, and the holder and owner [t]hereof" (R. 4).

5. It was provided in the policy itself that if the insured was "not in sound health" on the date of the issuance of the policy, the insurer might declare the policy void (R. 5). Petitioner refused to make payment upon the death of the insured upon the ground that *he was not in sound health* when the policy was issued (R. 6); but the rulings below precluded petitioner from proving that fact (R. 7).

6. The effect of the decision of the Court of Appeals was to wholly delete from the aforesaid statute the important qualifying words of the penalty clause which are italicized in the quotation above. The statute was construed as if the penalty clause had stopped with the word "policy," and thus had read—"in default of which no defense shall be allowed to such policy."

7. The reasons which your petitioner respectfully advances for the granting by Your Honors of the writ of certiorari as herein prayed, are:

(1) That the Court of Appeals has decided erroneously a question of general importance.

(2) That said decision is in conflict with all decisions in other jurisdictions involving similar statutes, and therefore tends to unsettle the law.

(3) That said decision, being the first rendered by any Federal Court, will establish an authoritative precedent which may greatly influence other courts in like cases.

(4) That if said decision is permitted to stand it may deprive insurers of *all defenses under all policies* of life insurance now outstanding or hereafter to be written in the District of Columbia when there are no written applications therefor or when copies of such applications are not attached to the policies.

WHEREFORE your petitioner prays the allowance of a writ of certiorari to the Court of Appeals of the District of Columbia in this case, there entitled *Washington Fidelity National Insurance Company,* a corporation, plaintiff in error, vs. *Winnie Burton,* No. 5264, that said cause may be reviewed and determined by this Court, and that the judgment of the said Court of Appeals may be reversed and set aside, and for such further relief and remedy in the premises as this Court may deem meet and proper.

WASHINGTON FIDELITY
NATIONAL INSURANCE CO.,
By HARRY G. WALTERS,
Agent.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
GILBERT L. HALL,
Counsel for Petitioner.

BRIEF IN SUPPORT.

Opinion Below.

The opinion of the Court of Appeals will be found at pages 12 to 14 of the record. Thus far it has been reported only in 60 Wash. Law Rep., at page 149.

Jurisdiction.

The judgment of the Court of Appeals was entered January 25, 1932 (R. 15). The jurisdiction of this Court rests on Section 240(*a*) of the Judicial Code as amended by Act of February 13, 1925.

The grounds upon which this Court's jurisdiction is invoked are stated in the petition, *supra,* at pages 3, 4.

Question Presented.

Whether the failure to attach copy of an application for life insurance to the policy precludes the insurer from interposing the defense, within the terms of the policy itself, that the insured was not in sound health when the policy was issued.

Statement of the Case.

The facts are sufficiently stated in the foregoing petition.

Specification of Error.

The Court of Appeals erred in holding that petitioner was not entitled to prove that insured was not in sound health when the policy was issued to him.

Argument.

The decision here sought to be reviewed precludes the insurer from interposing the defense to an action upon a life insurance policy that the *insured was not in sound health when the policy was issued.* The policy expressly provided that it might be declared void by the insurer if such were the fact, and it further provided that the policy *constituted "the entire agreement"* between the parties. The policy was complete in itself and contained no reference whatever to an application. The appellate court sustained the ruling of the trial judge that the defense stated above was not available because no application was attached to the policy. This conclusion was reached through an erroneous interpretation of the following statute:

> "Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy *on account of anything contained in, or omitted from, such application."* Sec. 657, D. C. Code (Italics ours).

The insurer offered no defense whatever on account of anything contained in an application nor on account of anything omitted therefrom. In fact, there was no evidence at the trial that there had been any written application for the policy. All the insurer sought to prove was that the insured was not in sound health

when the policy was issued (R. 7). This fact, if established, would have been a complete defense under the following terms of the policy itself:

> "If, (1) the Insured is not alive *or is not in sound health* on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, * * * then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud in which case all premiums will be forfeited to the Company." (Italics supplied.) (R. 5.)

The offered evidence was rejected by the trial judge, who ruled that the insurer could introduce no evidence whatever of the breach of the above terms of the policy because copy of application had not been attached thereto (R. 7). This ruling, which the Court of Appeals sustained, manifestly is not justified by the *language* of the statute. That language would seem to be unambiguous and to be confined to the denial of *defenses based* upon "anything contained in, or omitted from," *the application.*

As recently as February 15, 1932, in deciding the case of *Bergholm* vs. *Peoria Life Ins. Co.,* No. 297,

October Term, 1931 (U. S. S. C. Ad. Op., p. 306), this Court said:

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense."

But if there be uncertainty as to the intention of Congress, arising out of the language of said Section, it is proper, if not necessary, to inquire the purposes intended to be subserved by this legislation for such light as may thus be thrown upon the intention. These purposes have been referred to in a number of decisions involving similar statutes. In *Kirkpatrick* vs. *London Guar. & Acc. Co.* 139 Iowa 370, the Court said:

> "The purpose of the statute has been declared in a general way to be the prevention of any representations or warranties in the application being considered a portion of the contract, or available to the company as a defense, unless a copy of the application is incorporated or attached" (p. 373).

and in *Lenox* vs. *Greenwich Ins. Co.*, 165 Pa. St. 575, it was said:

> "The general intent was to keep these statements before the eyes of the insured, so that he might know his contract, and if it contained errors, have them rectified before it became too late" (p. 577).

The present Section 657 was enacted in 1902 and is an amendment of the original Act of 1901 (31 Stat., Chap. 854, Sec. 657, p. 1294). The original Act im-

posed no penalty for failure to attach copy of application. The addition of a penalty was the principal change made by the amendment and was expressed as follows: *"in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application."* If the purposes of legislation upon this subject were as stated by the Iowa and Pennsylvania courts, *supra,* how can it be supposed that Congress by the language last above quoted intended to deprive the insured of the benefit of express terms contained in the policy itself? If such had been the intention, the qualifying words—*"on account of anything contained in, or omitted from, such application,"* would have been omitted from the penalty, leaving it to read: *"in default of which no defense shall be allowed to such policy."* It is worthy of notice that this matter was twice the subject of consideration and legislation by Congress,—when enacting the original act of 1901 and the amended act of 1902.

Of the intention of Congress the Court of Appeals itself, in an earlier case (1918), referring to Section 657, said:

> "The manifest purpose of Congress in adopting it was to compel insurance companies, whether old line or fraternal, to state the entire contract either in the policy or the policy and application, so that the insured would be able to find the terms defining his obligations and rights as a policyholder in not more than two papers." (*Brotherhood of R. Trainmen* v. *Groves,* 48 App. D. C. 151, 154.)

All of the cases, under such statutes as Section 657, agree that, where the insurer fails to deliver a copy

of the application with the policy, the application is no part of the contract, and consequently the insurer may not defend upon any statement in or omission from the application, and may not offer the application in evidence for *any* purpose. In the present case, the insurer *sought to do neither*. All courts in which the point has arisen (except the Court of Appeals in the present case) hold that, unless the copy be attached, the application forms no part of the contract and the rights of the parties are to be determined by the terms of the policy alone. This is particularly emphasized when, as in the present case, the policy contains no reference to an application. But no other court (than the Court of Appeals) has held that the insurer who fails to attach a copy of a written application to the policy, is intended by these statutes to be penalized to the extent of denying it the right to show a breach of an express condition *of the policy* such as petitioner here relied upon. Petitioner was prevented by the ruling complained of from proving that the insured, who died within 18 months, was not in sound health when the policy was issued, and that, on the contrary, he was then in very bad health.

The Court of Appeals refers to none of the many decisions which have dealt with the question, nor to the text-writers upon the subject. Its opinion cites two cases only—both decided by that Court—and in neither was the present question considered or even touched upon. One of these is *Metropolitan Life Ins. Co.* vs. *Burch*, 39 App. D. C. 397, in which it was held that the requirement of Section 657, that copy of the

application be attached to the policy applied to the renewal of a lapsed policy; the other, *Metropolitan Life Ins. Co.* vs. *Hawkins*, 31 App. D. C. 493, that the insurer may not defend upon a warranty contained in the application, when a part only of the application was attached to the policy.

Statutes of the general nature of Section 657 are in force in approximately twenty states (1 Joyce on Insurance, 2d Ed., Sec. 190), and have been the subject of frequent interpretation by the State Courts. Careful research has failed to disclose a single decision in harmony with the conclusion of the Court of Appeals, or the views of any text-writer which would support that conclusion. It is not appropriate at this time to cite and discuss the long line of decisions upon this subject (not one of which is even mentioned by the Court of Appeals), but a few illustrative cases may properly be referred to.

In *Rauen* vs. *Prudential Ins. Co.*, 129 Iowa 725, a statute of Minnesota was involved which provided that "every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application." The Court said:

> "In our judgment the effect of this provision is to exclude or eliminate from the contract all reference to an application, a copy of which is not attached to the policy, and to render ineffective all defenses based upon anything contained in such application. To hold otherwise is to rob the statute of all effective force and

make its enactment meaningless. We are therefore disposed to hold that, if the application be not attached in obedience to the statute, the policy should be treated, construed, and enforced *as if no written application had been made"* (p. 731). (Italics supplied.)

In *Imperial Fire Ins. Co.* vs. *Dunham,* 117 Pa. St. 460, the Court said:

"The application was rightly excluded from the testimony. The provisions of the Act of May 11, 1881, P. L. 20, are conclusive on this point. No copy of the application or of the by-laws of the company was attached to the policy as that act requires; it constituted, therefore, no part of the policy or of the contract between the parties, and was not receivable in evidence. *The case is to be considered as if no such paper existed"* (p. 473). (Italics supplied.)

In *Metropolitan Life Ins. Co.* vs. *Scott,* 160 Miss. 537, the Court said:

"One evident purpose of the statute requiring the delivery to the insured of a copy of the application is to exclude or eliminate from the contract an application, a copy of which is not delivered to the insured with the policy, and to render ineffective any defenses or attempted defenses based upon anything contained in such application, but it does not follow that a failure to incorporate in or attach to the policy a copy of the application will preclude the company from relying on any defenses available to it under the terms of the policy. In the policy here involved there is no language or provision

indicating a purpose or attempt on the part of the appellant company to make anything found in the application a part of the contract. The policy was complete in itself, and purports to contain in plain language all the terms, conditions, and stipulations of the contract, and we do not think the company is precluded from relying on the express conditions and stipulations appearing on the face of the policy, by reason of the fact that the application contained representations or stipulations in reference to the same subject-matter. When the company chose to ignore the statements and representations appearing in the application, and incorporated in the policy in plain terms the conditions and stipulations upon which its validity should rest, and the policy was accepted by the insured as constituting a contract, it had the right to make any defenses it might have under the terms of the policy, without reference to such application" (p. 545).

In *Western and Southern Life Ins. Co.* vs. *Weber*, 183 Ky. 32, the Court said:

"For an additional reason it was error to sustain the demurrer to the third paragraph of the answer. As a defense it relied upon matters appearing both in the application and the policy, the latter containing this condition: 'And shall be void [the policy] if the insured * * * has had before said date [of the policy] any * * * disease of the brain.' Even if the statute which we have considered had been applicable to the facts of this case, a violation of it would not have prevented this defense, since it is one, as we have seen, based upon a condi-

> tion contained *in the policy* for '*the failure of the insurance company to attach a copy of the application to the policy will not preclude it from relying on any defense that it may have under the express terms of the policy without reference to the application*' " (p. 38). (Italics ours.)

In *Kirkpatrick* vs. *London Guar. & Acc. Co.*, 139 Iowa 370, the Court said:

> "The contention for appellee in the lower court and on this appeal is that, if representations or warranties were made in the application, a copy of which was not incorporated into or attached to the policy as required by statute, then no issue can be raised by the company as to representations or warranties found in the policy, although the policy makes no reference to such application; in other words, that although there are statements and warranties in the policy which, without reference to the application, are material to the contract, the defendant cannot raise any issue under such statements and warranties relating to the same subject matter, a copy of which was not incorporated into or attached to such policy" (p. 373).

and after discussing the point fully, the Court concluded, thus:

> "We are clearly of the opinion that the effect of failure to incorporate or attach an application by copy is to preclude the company from relying on any representations or statements in the application for the purpose of making out

its defense, and that *it is still open to the company to make any defense it may have under the terms of the policy without reference to such application*" (p. 377).

The conclusions of the text-writers from their consideration of the decided cases upon this subject are uniform, and indicate no doubts as to the proper interpretation of such statutes in this regard. Referring to the penalties which an insurer must suffer, if it omits to attach a copy of the application to the policy, the text-writer on the subject of "Insurance," in 14 R. C. L. at p. 886, concludes:

> "Failure of the insurance company to attach a copy of the application to the policy will not preclude it from relying on any defense it may have under the express terms of the policy without reference to the application."

1 Joyce on Insurance, 2d Ed., Sec. 190q, referring to the same subject, says:

> "The omission to endorse or attach a copy of the application does not, however, invalidate the policy, but only goes to the pleading and proof of the representations."

And in the same section the author says:

> "And where there is no reference whatever to the application and no reliance thereon or assertion of rights thereunder by the insurer, it is not precluded from defenses based only upon the policy itself."

In 2 Cooley's Briefs on Insurance, 2d Ed., p. 1091, et seq., many cases upon this subject are quoted and,

while the author points out the penalties for the failure to attach the application to the policy which are imposed by the statutes, as interpreted by the cases cited, it is nowhere suggested that the insurer is to be penalized to the extent of depriving it of the right of defending for breaches of conditions clearly set forth in the policy itself.

The present decision of the Court of Appeals is the first which has arisen in the Federal courts involving this question, and as that Court has the standing and dignity of a Circuit Court of Appeals, its decision is likely to have great weight when the same or a similar question arises in other courts.

It is believed that this Court should review and reverse the decision of the Court of Appeals because the question is one of general importance; because the decision is in conflict with all decisions upon the question in other jurisdictions; because it will establish an authoritative precedent in the Federal courts which may greatly influence other courts in like cases; and because, if permitted to stand, the decision may deprive insurance companies of *all* defenses under policies now in effect, or hereafter issued, when there are no written applications or when copies of applications are not attached to the policies.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 22

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, PETITIONER,

vs.

WINNIE BURTON.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONER.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
GILBERT L. HALL,
Attorneys for Petitioner.

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Opinion Below.

The opinion of the Court of Appeals will be found at pages 9 to 12 of the Record. It is reported in 56 F. (2d) 300.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 25, 1932 (R. 12). The jurisdiction of this Court rests upon Section 240(*a*) of the Judicial Code,

as amended by the Act of February 13, 1925 (43 Stats. L. 936). The grounds upon which jurisdiction was invoked (Petition, pp. 3 and 4) are:

1. That the Court of Appeals has decided erroneously a question of general importance.

2. That said decision is in conflict with all decisions in other jurisdictions involving similar statutes, and therefore tends to unsettle the law.

3. That said decision, being the first rendered by any Federal Court, will establish an authoritative precedent which may greatly influence other courts in like cases.

4. That if said decision is permitted to stand it may deprive insurers of all defenses under all policies of life insurance, now outstanding or hereafter to be written in the District of Columbia, when there are no written applications therefor or when copies of such applications are not attached to the policies.

Question Presented.

Whether, under the statute quoted below, failure to deliver a copy of an application for life insurance with a policy which contains the entire contract and does not refer to any application, precludes the insurer from enforcing the condition of the policy itself that it may be declared void if the insured was not in sound health on the date of the policy.

Statute Involved.

The statute involved is Section 657 of the Code of Law of the District of Columbia (now Title 5, Sec.

183 of the Code of the District of Columbia, 1930 Ed.) which reads:

> "Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy *on account of anything contained in, or omitted from, such application.*" (Italics supplied.)

Statement of the Case.

Respondent sued in the Municipal Court of the District of Columbia upon a policy of insurance issued by petitioner in December, 1927, to and upon the life of respondent's husband, in which policy respondent was named as beneficiary. The amount claimed was three hundred and seventy-one dollars and interest (R. 1). Insured died in May, 1929 (R. 5). The policy contained a provision (R. 4) that if insured was not "in sound health" at the date thereof the insurer might declare the policy void and that its liability in such event should be limited to the return of the premiums paid. It also contained the express statement that "this policy constitutes the entire agreement between the Company and the Insured and the holder and owner" thereof (R. 3). The insurer's defense was that the insured was not in sound health at the date of the policy (R. 6). At the trial, the Municipal Court rejected all evidence offered by petitioner, tending to

prove the defense stated, *upon the ground that copy of the application for the policy had not been attached to and delivered with it* (R. 6, 7). Judgment against petitioner was thereupon entered (R. 2).

On writ of error from the Court of Appeals, the ruling of the Municipal Court in excluding the offered evidence was assigned as error (R. 7). The judgment of the Municipal Court was affirmed by the Court of Appeals on January 25, 1932 (R. 12).

The penalty prescribed by the statute for the failure to deliver a copy of the application with the policy is to deprive the insurer of any defense "on account of anything contained in, or omitted from, such application," but in this case no defense was made or attempted to be made "on account of anything contained in, or omitted from," an application (R. 6, 7). Not only was there no copy of an application delivered with the policy (R. 5), but the policy contained no reference to a written application, and there was no evidence at the trial that there had been a written application therefor (R. 6). Furthermore the policy contained the specific recital, above mentioned, that it constituted "the entire agreement between the Company and the Insured, and the holder and owner (t)hereof" (R. 3).

Specification of Error.

The Court of Appeals erred in holding that petitioner was not entitled to prove that insured was not in sound health when the policy was issued to him.

ARGUMENT.

The decision here sought to be reviewed precludes the insurer from interposing the defense to an action upon a life insurance policy that the *insured was not in sound health when the policy was issued.* The policy expressly provided that it might be declared void by the insurer if such were the fact and that the policy constituted "the entire agreement" (R. 3, 4). The policy was complete in itself and contained no reference whatever to an application. The appellate court sustained the ruling of the trial judge that the defense stated above was not available because no application was attached to the policy. This conclusion was reached through an erroneous interpretation of the statute heretofore quoted at page 3.

The insurer offered no defense whatever on account of anything contained in an application nor on account of anything omitted therefrom. In fact, there was no evidence at the trial that there had been any written application for the policy. All the insurer sought to prove was that the insured was not in sound health when the policy was issued (R. 7). This fact, if established, would have been a complete defense under the following terms of the policy itself:

> "*If,* (1) *the Insured* is not alive or *is not in sound health on the date hereof;* or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before

> said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, * * * then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud in which case all premiums will be forfeited to the Company" (Italics supplied) (R. 5).

The offered evidence was rejected by the trial judge on the sole ground that the insurer could introduce no evidence whatever of the breach of the above terms of the policy because a copy of application had not been attached thereto (R. 7). This ruling, which the Court of Appeals sustained, manifestly is not justified by the *language* of the statute. That language would seem to be unambiguous and to be confined to the denial of defenses *based upon* "anything contained in, or omitted from," *the application.*

As recently as February 15, 1932, in *Bergholm* v. *Peoria Life Ins. Co.*, No. 297, October Term, 1931 (U. S. S. C. Ad. Op., p. 306), this Court said:

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense."

But if there be uncertainty as to the intention of Congress, arising out of the language of said Section, it is proper, if not necessary, to inquire as to the pur-

poses intended to be subserved by this legislation for such light as may thus be thrown upon the intention. These purposes have been referred to in a number of decisions involving similar statutes.

The Pennsylvania Act of May 11, 1881 (P. L. 20), in Sec. 1 provides:

> "All life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

The Supreme Court of Pennsylvania had this statute before it in the case of *Lenox* v. *Greenwich Insurance Co.*, 165 Pa. 575, 30 Atl. 940. With reference to the purpose of the Act, the Court said:

> "It is well known that the evil aimed at in this legislation was the custom of insurance companies to put in their blank forms of application long and intricate questions or statements

to be answered or made by the applicant, printed usually in very small type, and the relevancy or materiality not always apparent to the inexperienced, and therefore liable to become traps to catch even the innocent unwary. The general intent was to keep these statements before the eyes of the insured, so that he might know his contract, and, if it contained errors, have them rectified before it became too late."

The Iowa statute reads as follows:

"Sec. 1741. Copy of Application. All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid; but, if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging, or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

In *Kirkpatrick* v. *London Guarantee & Accident Co.*, 139 Iowa 370, 115 N. W. 1107, 19 L. R. A. (N. S.) 102, the Supreme Court of Iowa said, discussing the above

statute: "the purpose of the statute has been declared in a general way to be the prevention of any representations or warranties in the application being considered a portion of the contract, or available to the company as a defense, unless a copy of the application is incorporated or attached."

And in another case the same court discussing the same statute said:

> "One of the purposes of this statute, if not the sole purpose, is to cause all parts of the contract of insurance to appear in or upon the policy." *MacKinnon* v. *Mutual Fire Ins. Co.*, 89 Iowa 170, 56 N. W. 423.

The statute of Washington, Section 7075 Rem. Comp. Stat. provides:

> "Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract, and the insurance company making such insurance contract, unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon such application shall become a part of the insurance contract, and failing so to do it shall not be made a part of the insurance contract."

In dealing with this statute in *Washington Fire Relief Association* v. *Albro*, 130 Wash. 114, 226 Pac. 264, the Washington Court said:

> "The effect of this statute in cases where the application has not been delivered with the policy is not to make the policy void, but to prevent the insurance company from pleading or proving any such application, or using any such application in any way to affect the policy itself."

The present Section 657 was enacted in 1902 and is an amendment of an Act of 1901 (31 Stat., Chap. 854, Sec. 657, p. 1294), and the latter was a re-enactment of an Act passed in 1887 (24 Stats. 366, Chap. 46, Sec. 6). Neither the original Act nor the Act of 1901 imposed any penalty for failure to attach a copy of the application. The addition of a penalty was the principal change made by the amendment of 1902 and was expressed as follows: "*in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application.*" If the purposes of legislation upon this subject were as stated by the Iowa, Pennsylvania and Washington courts, *supra,* how can it be supposed that Congress by the language last above quoted intended to deprive the insured of the benefit of express terms contained in the policy itself? If such had been the intention, the qualifying words "*on account of anything contained in, or omitted from, such application,*" would have been omitted from the penalty, leaving it to read: "*in default of which no defense shall be allowed to such policy.*" It is worthy of notice that this matter was three times the subject of consideration and legislation by Congress, when enacting the original Act of 1887, the Act of 1901 and the amended Act of 1902.

Of the intention of Congress the Court of Appeals itself, in an earlier case (1918), referring to section 657, said:

> "The manifest purpose of Congress in adopting it was to compel insurance companies, whether old line or fraternal, to state the entire contract *either in the policy* or the policy and application, so that the insured would be able to find the terms defining his obligations and rights as a policyholder in not more than two papers." *Brotherhood of R. Trainmen* v. *Groves,* 48 App. D. C. 151, 154. (Italics supplied.)

All of the cases, under statutes similar to section 657, agree that, where the insurer fails to deliver a copy of the application with the policy, the application is no part of the contract, and consequently the insurer may not defend upon any statement in or omission from the application, and may not offer the application in evidence for any purpose. In the present case, the insurer sought to do neither. All courts in which the point has arisen (except the Court of Appeals in the present case) hold that, unless the copy be attached, the application forms no part of the contract and the rights of the parties are to be determined by the terms of the policy alone. This is particularly emphasized when, as in the present case, the policy contains no reference to an application. But no other court (than the Court of Appeals) has held that the insurer who fails to attach a copy of a written application to the policy, is intended by these statutes to be penalized to the extent of denying it

the right to show a breach of an express condition *of the policy* such as petitioner here relied upon. Petitioner was prevented by the ruling complained of from proving that the insured, who died within eighteen months, was not in sound health when the policy was issued.

The Court of Appeals referred to none of the decisions which have dealt with the question, nor to the text-writers upon the subject. Its opinion cites two cases only—both decided by that Court—and in neither was the present question considered or even touched upon. One of these is *Metropolitan Life Ins. Co.* v. *Burch*, 39 App. D. C. 397, in which it was held that the requirement of section 657, that a copy of the application be attached to the policy, applied to the renewal of a lapsed policy; the other, *Metropolitan Life Ins. Co.* v. *Hawkins*, 31 App. D. C. 493, in which it was decided that the insurer may not defend upon a warranty contained in the application, when a part only of the application was attached to the policy.

Statutes of the general nature of Section 657 are in force in approximately twenty states (1 Joyce on Insurance, 2d Ed., Sec. 190), and have been the subject of frequent interpretation by the State courts. Careful research has failed to disclose a single decision in harmony with the conclusion of the Court of Appeals, or the views of any text-writer which would support that conclusion. Some of the state cases will now be adverted to.

In *Rauen* v. *Prudential Ins. Co. of Am.*, 129 Iowa 725, 106 N. W. 198, the policy, issued in Minnesota, contained no copy of the application. The Minnesota

statute required attachment, but prescribed no penalty for failure. The Iowa court interpreting the statute said:

> "The statute of Minnesota pleaded and relied upon by the appellant, and above quoted requires that each policy of insurance which contains a reference to the application of the insured, 'whether as a part of the policy or as having any bearing thereon,' must have attached thereto a correct copy of the application. In our judgment the effect of this provision is to exclude or eliminate from the contract all reference to an application a copy of which is not attached to the policy, and to render ineffective all defenses based upon anything contained in such application. To hold otherwise is to rob the statute of all effective force and make its enactment meaningless. We are therefore disposed to hold that, if the application be not attached in obedience to the statute, the policy should be treated, construed, and enforced as if no written application had been made. * * * The statute is clearly intended to protect the policyholder by requiring the company to place in his hands written evidence of the entire contract between them, and a company issuing a policy to which no copy of application is attached must be held to have thereby expressed its purpose to waive or relinquish its right to have said application considered as any part of the contract."

In *Panopoulos, Extr.* v. *Metropolitan Life Ins. Co.*, 96 Pa. Sup. Ct. 325, Helen Panopoulos, a married woman, in 1926 insured her life with defendant company in favor of her estate, the policy being an indus-

trial, or weekly payment one. She died on March 18, 1926. In an action by her executor on the policy the defendant set up as a defense a serious operation performed on the insured and not indorsed on the policy as required by terms thereof. The policy stated it was issued "subject to the conditions below and on page two hereof, each of which is hereby made a part of this contract, and contracted by the insured and every person entitled to claim thereunder, to be a part hereof." Among the conditions was the following:

> "This policy contains the entire agreement between the company and the insured and the holder and owner hereof"; and:
>
> "If, (2)—the insured—has, within two years before the date hereof, been attended by a physician for any serious disease or complaint, or before said date has had any pulmonary disease or chronic bronchitis or cancer or disease of the heart, liver or kidneys, unless such—medical attention or previous disease is specifically recited in the 'space for endorsements' on page four in a waiver signed by the secretary—then in any such case the company may declare this policy void * * *"

There was a directed verdict for defendant below, and in affirming the judgment the Court said:

> "This case does not involve the question of the truth or falsity of a warranty as to some matter material to the risk made in the policy. Under this policy the application, if one there was, is not made part of the contract, but the company protected itself by the provision that the policy constitutes the entire agreement be-

tween it and the insured and the holder and owner thereof. It must be held to have meant what it said. This Court said in *Connell* v. *Life Ins. Co.*, 16 Pa. Sup. Ct. 520, 529, speaking by the present President Judge, 'there is a difference between obtaining a contract through a misrepresentation as to a fact, and making the existence of that fact a condition upon which the contract, by its written terms, is dependent.' In that case the policy provided: 'This policy is void if the insured, before its date, has been rejected for insurance by themselves or any other company, or has been attended by a physician for any serious disease or complaint.' Referring to this language, Judge Porter said: 'These were unequivocal, absolute covenants. Whether the policy was void was dependent upon actual conditions, past or present, and not upon the knowledge of those conditions possessed by the parties. The Act of June 23, 1885, relates "to warranties in the application for life insurance policies," and has no application to the express covenants of the policy itself, not directly dependent upon such warranties. The defense in this action was that the assured, prior to and at the time of the issuance of the policy, had Bright's Disease of the kidneys and that she continued to suffer from and died of that disease. If this was true the express covenant of the parties hereinbefore recited cannot be disregarded, and the policy was void.' The principle announced in the Connell case is controlling here. The fact that the insured had not, within two years before the date of the policy, been attended by a physician for any serious disease or complaint was made by the policy a condition precedent to defendant's

> liability for any more than the return of premiums paid on it. There can be no doubt that the fact that the insured was attended by a physician within two years for the disease or complaint which resulted in her operation was palpably and manifestly material to the risk, and that uncontradicted proof of a false warranty in respect to it in an application for insurance would have required binding instructions in defendant's favor in a case involving false warranties in the application * * *. The same result must follow when, as here, there is uncontradicted proof that a condition, past or present, materially affecting the risk, upon which the parties have covenanted that the validity of the policy shall depend, never existed."

The same Court in the case of *Hood* v. *Prudential Insurance Co.*, 22 Pa. Sup. Ct. Rep. 244, held:

> "The object of the Act of May 11, 1881, P. L. 20, was to relieve policy holders from warranties contained in their application, unless said application was attached to the policy, but it has not been held, so far as we know, that the fact of whether the insured was in sound health or not, could not be proved outside the application. It probably would not be proper to show the contents of the paper. Certainly not, if the insured or his representatives were to be bound by anything contained in the paper from the effects of which he is relieved by the act of assembly, but substantive facts not connected with the representations contained in the application may undoubtedly be proved by competent testimony outside the application."

And practically the same rule was laid down by that Court in *Moore* v. *Bestline*, 23 Pa. Sup. Ct. Rep. 6.

The Supreme Court of Pennsylvania, considering this question in *Imperial Fire Ins. Co.* v. *Dunham*, 117 Pa. 460, 12 Atl. 668, 673, said:

> "The application was rightly excluded from the testimony. The provisions of the Act of 11th of May, 1881 (P. L. 20), are conclusive on this point. No copy of the application or of the by-laws of the company was attached to the policy as that Act requires. It constituted, therefore, no part of the policy, or of the contract between the parties, and was not receivable in evidence. The case is to be considered as if no such paper existed."

To the same effect are: *Norristown Title, etc., Co.* v. *John Hancock Mutual Life Ins. Co.*, 132 Pa. 385, 19 Atl. 270, and *Hebb* v. *Kittanning Ins. Co.*, 138 Pa. 174, 20 Atl. 837.

Wilcox v. *Continental Ins. Co. of New York*, 85 Wis. 193, 55 N. W. 188, was a case in which plaintiff applied to defendant for insurance on a stallion and a policy was issued which provided:

> "This entire policy, unless otherwise provided by agreement indorsed thereon, or added thereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

There was both a chattel mortgage and insurance on the stallion at the issuance of the policy sued on, but no questions were asked by the insurance agent about this. Defendant set up the above condition of the policy. Section 1945*a*, Wisconsin Statutes, required insurance companies to "attach to such policy, or endorse thereon, a true copy of any application or representations of the assured, which by the terms of such policy are made a part thereof, * * * or referred to therein" or be precluded from disproving the statements so made in such application upon the trial. Discussing plaintiff's objection to this defense, the Court said:

> "The argument here is to the effect that the defense is based wholly upon a supposed 'implied false representation' made by the plaintiff as to the nonexistence of such prior insurance and mortgage; and hence, in analogy to the rule under the statute, the defendant should be precluded from proving the same. But we do not understand such to be the defense. On the contrary, we understand the defense to be based upon the strict terms of the contract, which, as already indicated, is to the effect that the policy should not be operative at all in case of such prior insurance or mortgage, unless by agreement in writing attached to or indorsed upon the policy, as mentioned."

The judgment below for the defendant was affirmed.

In *MacKinnon* v. *Mutual Fire Ins. Co.*, 89 Iowa 170, 56 N. W. 423, the policy sued on provided:

> "If the building stands on leased ground or if the title be less than fee simple in the insured,

> it must be so represented to said company, and so expressed in the written portion of the policy; otherwise, said policy shall be void" and "if said insured shall conceal any fact material to the risk, said policy shall become void."

The defendant offered evidence to show violation of both of the above terms of the policy, but the evidence was excluded for failure to attach to the policy a copy of the application as required by the Iowa statute set out on page 8, *supra*. Discussing this phase of the case the Court said:

> "We have seen that this policy expressly provides that if the buildings stand on leased ground, or if the title be less than fee simple in the insured, it must be so represented to said company, and so expressed in this policy; otherwise, the policy will be void.
>
> It is not expressed in the policy that the buildings stood on leased ground, nor that the title in the insured was less than fee simple, and the inference must be that it was not so represented to the company. The policy also provides that, if the insured concealed any fact material to the risk, the policy shall be void. It was material to the risk whether the buildings stood upon leased ground, and whether the title of the insured was less than fee simple. The evidence excluded tends to show that the buildings were on leased ground, that the title of the insured was less than fee simple, and that the insured concealed those facts. It did not tend to prove an application or representation not appearing in or upon the policy, but rather the breach of conditions expressed in the policy. If it may be

> said that a failure to disclose the true state of their title was a representation on the part of the insured, then it is a representation appearing in the policy, and not within the restrictions of the statute."

Washington Fire Relief Ass'n v. *Albro* (Wash.), 226 Pac. 264, was a suit to recover back, on ground of fraud, money paid defendant under a fire insurance policy after a loss had occurred. In a written application insured had stated that he had had no other insurance. He had made the same statement orally prior to issuance of the policy and again during the negotiations for settlement. Plaintiff Company wished to prove these statements by defendant but they were excluded on the ground that insured had not been given a copy of the application with the policy as required by Section 7075 Rem. Comp. Stat. which appears at page 9, *supra*. The Court said:

> "Under this section, the insurance company is not compelled to deliver a copy of the application for insurance with the policy, but, if it fail to make such delivery, the application then does not become a part of the insurance contract, but the insurance contract shall then be construed according to its terms and conditions upon its face, without reference to what may have been contained in the application.
>
> "The effect of the statute in cases where the application has not been delivered with the policy is not to make the policy void, but to prevent the insurance company from pleading or proving any such application, or using any such application in any way to affect the policy it-

> self. If there were no provisions in the policy itself relating to other insurance, then, in this case, the insurance company would be prevented from in any way raising that question. But the policy itself does make provision in regard to other insurance, and under Section 7075, *supra,* which provides that it shall be construed according to its terms and conditions, it was open to the appellant to prove that representations had been made in regard to other insurance, which, if false and fraudulent and operative to induce the entering into the contract of insurance, could be proven by any means other than the introduction of the application itself. The Court, therefore, was in error in excluding the testimony offered to show representations and statements, other than those contained in the application, made by the respondents at the time they secured the policy, or when they were attempting to enforce payment thereunder."

The Supreme Court of Iowa considered this question in *Kirkpatrick* v. *London Guarantee & Accident Co., supra,* 139 Iowa 370, 115 N. W. 1107, 19 L. R. A. (N. S.) 102. The statute involved is set out above at page 8. The following apt quotations are taken from the opinion in that case:

> "The contention for appellee" (the insured) "in the lower court and on this appeal is that, if representations or warranties were made in the application, a copy of which was not incorporated into or attached to the policy as required by statute, then no issue can be raised by the company as to representations or warranties found in the policy, although the policy makes no reference to such application; in other

words, that, although there are statements and warranties in the policy which, without reference to the application, are material to the contract, the defendant cannot raise any issue under such statements and warranties relating to the same subject matter, a copy of which was not incorporated into or attached to such policy. The appellant, on the other hand, insists that the existence of an application, not incorporated into or attached to the policy by reference does not preclude it from relying by way of defense on falsity of statements or breaches of warranty available to it under the policy as delivered, without reference to any application which may have been made, but which was not thus incorporated or attached. Appellant did not, as the question was finally presented in the lower court, plead or attempt to rely upon the falsity of any statements or the breach of any warranty found in the application itself, but relied exclusively upon the terms of the policy as furnishing the basis for the defenses which it interposed in this respect. The section of the code which we are now asked to interpret has frequently been considered by this Court, and has been liberally applied in excluding an insurance company from relying in any way upon representations or warranties contained in an application, a copy of which has not been incorporated into or attached to the policy; and the purpose of the statute has been declared in a general way to be the prevention of any representations or warranties in the application being considered a portion of the contract, or available to the company as a defense, unless a copy of the application is incorporated or attached" (Citations). "An evident purpose of

this statute is that, when the application is made a part of the contract, * * * a true copy must be attached to the policy, so that the writings composing the contract may all appear together, and that the insured may be in possession of the evidence of what his contract is. *Johnson* v. *Des Moines L. Ins. Co.*, 105 Iowa 273, 75 N. W. 101."

"Nothing said in any of our cases gives confidence to the thought, however, that a failure to incorporate or attach a true copy of the application in or to the policy should preclude the company from relying on any defense available to it under the terms of the policy as to which no reference to an application not incorporated or attached by copy is necessary. There is no language in this policy indicating a purpose or attempt on the part of the company to make anything found in the application a part of the contract. The policy was complete in itself, and purports to contain all the terms and stipulations of the contract of insurance. If the company sees fit to ignore the statements and warranties of the application, and to issue a policy which purports to contain in plain terms all the stipulations and conditions of the contract, and such a policy is accepted by the assured as constituting the contract, we see no reason for holding that the company has, by omitting to incorporate or attach a copy of an application, debarred itself from insisting upon the policy as written as constituting the complete and conclusive contract between the parties. The assured has no cause to complain if the company fails to give any consideration to his representations and warranties in the application."

In *Western & Southern L. Ins. Co.* v. *Weber,* decided in 1919 by the Court of Appeals of Kentucky, 209 S. W. 716, 183 Ky. 32, the Insurance Company had issued a policy of insurance upon the life of one John L. Weber, agreeing to pay Petie, wife of Weber, $200 upon certain conditions. Petie had made a written application for the policy in which she had given Weber's age as forty-nine, when in fact it was fifty-six. The company alleged that relying upon the statement that insured was only forty-nine no physical examination was made of him as would have been done had his true age been given, and that such examination if made, would have developed the fact that insured was insane at the time of the application. The policy contained no reference to the application as forming any part of the contract between the parties and neither the application nor any copy thereof was attached to the policy.

Sec. 679 Kentucky Statutes provides:

> "All policies or certificates hereafter issued to persons within the Commonwealth of Kentucky by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the by-laws, or the rules of the corporation, either as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, shall have such application, by-laws and rules, or the parts thereof relied upon as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, attached to the policy or certificate, or printed on

> the face or reverse side thereof, and unless either so attached and accompanying the policy, or printed on the face or reverse side thereof, shall not be received as evidence in any action for the recovery of benefits provided by the policy or certificate, and shall not be considered a part of the policy, or of the contract between the parties."

The case came before the court on demurrer to defendant's plea that insured had mental disease when the policy was issued. The lower court sustained the demurrer. The appellate court reversed the judgment and decided that since the policy made no reference to the application, the section of the statutes did not apply, and the opinion then continued as follows:

> "For an additional reason it was error to sustain the demurrer to the third paragraph of the answer. As a defense it relied upon matters appearing both in the application and the policy, the latter containing this condition: 'And shall be void (the policy) if the insured * * * has had before said date (of the policy) any * * * disease of the brain.' Even if the statute which we have considered had been applicable to the facts of this case, a violation of it would not have prevented this defense, since it is one, as we have seen, based upon a condition contained *in the policy* for 'the failure of the insurance company to attach a copy of the application to the policy will not preclude it from relying on any defense that it may have under the express terms of the policy without reference to the application.'" Citing 14 R. C. L. 886.

In 1931 this same question came before the Supreme Court of Mississippi in the case of *Metropolitan Life Ins. Co.* v. *Scott*, 160 Miss. 537, 134 So. 159. Sec. 5174 Mississippi Code of 1930, reads:

> "All life insurance companies doing business in the state of Mississippi shall deliver to the insured with the policy, certificate or contract of insurance in any form a copy of the insured's application, and in default thereof said life insurance company shall not be permitted in any court of this state to deny that any of the statements in said application are true."

The facts of that case are practically identical with those of the case at bar except that in the former there *was evidence of a written application* having been made. It was an appeal from a judgment for plaintiff in a suit on the insurance policy. The policy provided:

> "If (1) the Insured is not alive or is not in sound health on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or any other company, * * * then, in any such case, the Company may declare this Policy void" * * *

Defendant pleaded the above conditions of the policy and that deceased was not in sound health at time policy issued. Plaintiff contended that defendant could not rely on this because it had required a written application showing insured was in sound health and had not attached a copy of the application to the policy. The Court, however, said:

"The appellant by its pleadings did not rely upon the falsity of any statements or the breach of any warranty found in the application itself, but relied exclusively upon the terms of the policy as the basis of the defenses interposed, and it contends that the existence of an application not incorporated into or attached to the policy by reference, and not delivered to the insured with the policy, does not preclude it from relying on breaches of conditions or warranties contained in the policy itself.

"One evident purpose of the statute requiring the delivery to the insured of a copy of the application is to exclude or eliminate from the contract an application, a copy of which is not delivered to the insured with the policy, and to render ineffective any defenses or attempted defenses based upon anything contained in such application, but it does not follow that a failure to incorporate in or attach to the policy a copy of the application will preclude the company from relying on any defenses available to it under the terms of the policy. In the policy here involved there is no language or provision indicating a purpose or attempt on the part of the appellant company to make anything found in the application a part of the contract. The policy was complete in itself, and purports to contain in plain language all the terms, conditions, and stipulations of the contract, and we do not think the company is precluded from relying on the express conditions and stipulations appearing on the face of the policy, by reason of the fact that the application contained representations or stipulations in reference to the same subject matter. When the company chose to ignore the statements and representations ap-

> pearing in the application, and incorporated in the policy in plain terms the conditions and stipulations upon which its validity should rest, and the policy was accepted by the insured as constituting a contract, it had the right to make any defenses it might have under the terms of the policy, without reference to such application."

The conclusions of the text-writers from their consideration of the decided cases upon this subject are uniform, and indicate no doubts as to the proper interpretation of such statutes in this regard. Referring to the penalties which an insurer must suffer, if it omits to attach a copy of the application to the policy, the text-writer on the subject of "Insurance," in 14 R. C. L. at p. 886, concludes:

> "Failure of the insurance company to attach a copy of the application to the policy will not preclude it from relying on any defense it may have under the express terms of the policy without reference to the application."

And Joyce in Vol. 1 of his work on Insurance, 2d Ed. Sec. 190*q*, says:

> "The omission to endorse or attach a copy of the application does not, however, invalidate the policy, but only goes to the pleading and proof of the representations."

And further on in the same section he says:

> "And where there is no defense whatever to the application and no reliance thereon or assertion of rights thereunder by the insurer, it is

not precluded from defenses based only upon the policy itself."

In 2 Cooley's Briefs on Insurance, 2d Ed., p. 1091, *et seq.*, many cases upon this subject are quoted and, while the author points out the penalties for the failure to attach the application to the policy which are imposed by the statutes, as interpreted by the cases cited, it is nowhere suggested that the insurer is to be penalized to the extent of depriving it of the right of defending for breaches of conditions clearly set forth in the policy itself.

Conclusion.

It is respectfully submitted that the Court of Appeals erred in holding that petitioner could offer no evidence in support of its defense under a specific term of the policy, and that its judgment should therefore be reversed.

WALTER C. CLEPHANE,
J. WILMER LATIMER,
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Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. ~~329~~ 22

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, a Corporation, *Petitioner,*

vs.

WINNIE BURTON.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

W. GWYNN GARDINER,
GEORGE A. MADDOX,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 819.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, a Corporation, *Petitioner*,

vs.

WINNIE BURTON.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

For answer to the Petition of the Washington Fidelity National Insurance Company, a corporation, asking this Court to grant its petition for a writ of certiorari, respondent respectfully shows:

(a) Statement of question before the Court as shown by the record.

The decision of the Court of Appeals in the District of Columbia states the facts as they appear in the record before it.

It heard and considered the question before it which was the construction of a statute applicable only to the District of Columbia. Its decision construing that statute was in accordance with prior decisions of that court and of other courts.

The question here involves a controversy between individuals.

The record contains no question of general public interest or of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute of the United States, which has not been, but should be settled by this Court.

The decision is in conformity with all decisions of the Court of Appeals of the District of Columbia involving like questions.

It gives full and proper effect to every decision of this Court.

The decisions cited by counsel for the Petitioner has to do with statutes differing in some respects from the statute construed by the Court in this case.

Respectfully submitted,

W. Gwynn Gardiner,
George A. Maddox,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 22.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY,
Petitioner,

vs.

WINNIE BURTON.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR THE RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 22.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY,
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vs.

WINNIE BURTON.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR THE RESPONDENT.

STATEMENT OF THE CASE.

The respondent sued in the Municipal Court of the District of Columbia upon a policy of insurance issued on December 12, 1927, to and upon the life of respondent's husband, in which policy respondent was named beneficiary. The amount claimed was $372.00, with interest from May 22, 1929, the date of the death of the insured. (R. p. 1.)

There was a written application made by the insured but a copy of same was not attached to and delivered to the insured with the policy. (R. p. 6.)

At the trial in the Municipal Court of the District of Columbia, the plaintiff offered in evidence the policy of insurance, the premium receipt books showing payments of all premiums due the insurer from the date of the policy until the death of the insured, and put in evidence the certificate of death and the attending physician's certificate of death and stated to the court with the assent of counsel for the defendant insurer that there was no controversy between the plaintiff and defendant as to the fact of death and that the insurer had declined to pay to the plaintiff the $372, amount provided by the terms of the policy. (R. pp. 5, 6.) The plaintiff also introduced evidence showing that the policy was issued in the District of Columbia and delivered in said District to the insured, and all premiums were paid in the District of Columbia. Thereupon the plaintiff rested.

The policy contained a provision that if the insured was not "in sound health" on the date of the policy, then in such case the insurer might declare the policy void and the liability of the Company in the case of such declaration or in case of any claim under the policy, should be limited to the return of the premiums paid on the policy, except in the case of fraud in which case all premiums would be forfeited to the Company.

There was also a provision in the policy that in case the age of the insured was misstated, the amount payable under the policy should be such as the premium paid thereon would have purchased at the correct age. (R. p. 4.)

There was also a provision in the policy that, "This policy shall be incontestible after it has been in force, during the lifetime of the Insured, for a period of two years from the date of its issue, except for non-payment of premiums, fraud or misstatement of age." (R. p. 5.)

There was also a provision in the policy, "This Policy constitutes the entire agreement between the Company and the insured and the holder and owner hereof."

DEFENSE.

At the trial in the Municipal Court of the District of Columbia, the Company's defense was that the insured was not in sound health on the date of the policy. (R. p. 6.) At the trial the defendant Company offered in evidence testimony tending to prove such defense, which evidence was objected to by the plaintiff on the ground that no copy of the application had been attached to and delivery with the policy to the insured by the Company. The trial court rejected this offered evidence. No further evidence being offered by the defendant, judgment against the Company was thereupon entered for the plaintiff. (R. p. 2.)

On writ of error from the Court of Appeals of the District of Columbia, the ruling of the Municipal Court in excluding the offered evidence was assigned as error. (R. p. 7.) The judgment of the Municipal Court was affirmed by the Court of Appeals on January 25, 1932. (R. pp. 10-11-12.)

SPECIFICATION OF ERROR.

The petitioner specifies that the Court of Appeals erred in holding that the plaintiff Company was not permitted to prove that the insured was not in sound health on the date of the policy.

ARGUMENT.

The admissibility of testimony tending to prove that the insured was not in sound health on the date of the policy involves the proper construction and interpretation of an Act of Congress applicable to the District of Columbia *only*.

This policy sued upon having been made and delivered to the insured in the District of Columbia, where the insured

lived and died, and where all premiums due the Company were paid, is a District of Columbia contract and is governed by its laws.

National Union vs. Sawyer, 42 App. D. C. 475.
Orient Ins. Co. vs. Daggs, 172 U. S. 557.

Under the incontestable clause in the policy, the policy was in force from its date and voidable for two years upon any of the grounds reserved therein, but not thereafter, except for fraud.

Healy vs. Metropolitan Life Ins. Co., 37 App. D. C. 240-245.
Mutual Res. Fund Life Association vs. Austin, 142 Fed. 398.
Mutual Reserve Fund Life Asso. vs. Austin, 6 L. R. A. (N. S.) 1064, 73 C. C. A. 498, 142 Fed. 398.

The question whether the offered evidence should or should not have been admitted is determined by the interpretation to be placed upon Sec. 657 of the Code of Law of the District of Columbia (now Title 5, Sec. 183 of the Code of the District of Columbia, 1930 Ed.) which reads as follows:

"Sec. 657. Copy of Application to Be Delivered with Policy.—Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of any thing contained in, or omitted from, such application."

The respondent here claims that under this local statute the application and the policy taken together constitute the whole contract between the Company and the insured and the holder and owner thereof. This local statute is intended

to protect the insured in two ways, namely, first by having both the application and the policy before the insured, so that he may know his contract, and if it contains error, he may have same corrected before it becomes too late; and secondly that in case of litigation the insured may have the application before the court to prove such application and representations by way of estoppel or waiver to defeat some defense which the Company might otherwise make under the provisions of the policy. Suppose for example in the instant case the insured had stated in his application he had been suffering from some disease but the Company believing same not serious in its nature as increasing its risk, nevertheless issued the policy, he should be allowed under the statute to have this application before the court, so that the representations might defeat the defense of *not in sound health* because the Company would be estopped because of having waived its right to complain of such condition. Dunbar vs. Insurance Company, 72 Wis. 492, 40 N. W. Rep. 386.

The policy sued upon in this case contains a provision: "This Policy constitutes the entire agreement between the Company and the Insured and the holder and owner hereof." This is an attempt by the Company to make the policy alone the entire contract but the local statute makes the application and the policy the whole contract of insurance. The Company cannot do this.

National Union vs. Sawyer, 42 App. D. C. 475.
Morse vs. Brainard, 42 App. D. C. 448.

This local statute under consideration has been before our local courts and has been given a liberal interpretation to accomplish its purpose.

In Metropolitan Life Ins. Co. vs. Hawkins, 31 App. D. C. 493-489, the court had before it the construction of this local statute. In his application the insured stated that he was in sound health and had not been attended in any

hospital for the past two years, etc. The defense was that he had been treated in Emergency Hospital during the two years prior to the issuing of the policy to him. The court rejected the evidence because only a part and not all of the application had been delivered with the policy. The court said in part, "This question of materiality, however, is settled by the statute which requires a copy of the application, that is to say the entire application, that is made for the policy. It left no discretion on the insured to select such parts of the application as it may deem material for delivery with its policy. This conclusion renders it unnecessary to consider the question of the competency of the physician's testimony. The application being inadmissible as a ground of defense, there is no foundation for other evidence."

In Metropolitan Life Ins. Co. vs. Burch, 39 App. D. C. 398-405, the court had before it whether the statute applied to an application for the restoration or renewal of a policy after it had lapsed for non-payment of premiums. No copy of the renewal application had been attached to the policy. The court said:

> "The purpose of the provision is that the insured shall be furnished with a copy of the application, upon the representations in which the validity of the policy, and its binding force may be made to depend. The rule of public policy, defined, applies with equal force to an application which renews the original policy, and amounts to a new contract of insurance embracing the terms of the original, but dates from the time of the renewal. The effect of the new contract, evidenced by the terms of the original one and the renewal application, is dependent upon the truthfulness of the representations made in the renewal application."
>
> "The case of Holden vs. Metropolitan L. Ins. Co., 188 Mass. 212, 74 N. E. 337, relied on by the appellant, is not in point. *The statute therein construed is materially different* from Sec. 657."

It will be noted that in both of the cases immediately above quoted the defense was on something contained in the application or application for a renewal, the question of whether a defense may be made on the policy, where no copy of the application is attached to the policy had not been before the Court of Appeals until the present case and the court held no defense could be made.

FEDERAL COURTS.

The construction of the constitution and laws of a state by its courts is as a general rule, binding on Federal Courts.

> Forsythe vs. Hammond, 166 U. S. 509.
> Christy vs. Pridgeon, 71 U. S. 196.

This is particularly true as regards rules of evidence.

> Continental Life Ins. Co. vs. Union Trust Co., 112 U. S. 250.

STATE COURT DECISIONS.

The petitioner asks this court to reverse the Court of Appeals of the District of Columbia in its interpretation of this local statute, because the petitioner says certain state courts have made decisions under similar statutes which conflict with this decision of our Court of Appeals. Several state court decisions are cited in support of this contention and we shall now point out that while the statutes of the several states whose decisions are quoted by the petitioner are *somewhat similar they are essentially different*, from our local statute.

The Massachusetts statute provides:

> "Every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must be attached thereto a correct copy of the application and unless so attached, the same shall not be considered a part of the policy or received in evidence.

This statute of Massachusetts our Court of Appeals in Metropolitan L. Ins. Co. vs. Burch, *supra*, said was *materially different from our local statute.*

The Kentucky Statute provides:

> "Sec. 679. All policies or certificates hereafter issued to persons within the Commonwealth of Kentucky by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the by-laws, or the rules of the corporation, either as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, shall have each application, by-law and rules or the parts thereof relied upon as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, attached to the policy or certificate, or printed on the face or reverse side thereof, and unless either so attached and accompanying the policy, or printed on the face or reverse side thereof, shall not be received as evidence in any action for the recovery of benefits provided by the policy or certificate, and shall not be considered a part of the policy or of the contract between the parties."

The case of Western & Southern L. Ins. Co. vs. Weber, 183 Ky. 32, 209 S. W. 716, held that as the policy made no reference to the application it was not therefore a part of the contract of insurance. The court held that a provision in the policy itself to the effect that the policy should be void if the insured had before the date of the policy any disease of the brain permitted the Company to make defense on the ground of mental disease. In other words the policy was the entire contract between the parties and defense was made upon the very terms of the policy.

The Mississippi statute provides, Section 5174, Code 1930:

> "All life insurance companies doing business in the state of Mississippi shall deliver to the insured with

> the policy, certificate or contract of insurance in any form, a copy of the insured's application, and in default thereof, said life insurance company shall not be permitted in any court of the state to deny that any of the statements in said application are true."

Met. Life Ins. Co. vs. Scott, Admr., 160 Miss. 537, 545, is under that statute. There was no application attached to the policy and the court allowed a defense on a provision in the policy. The defense was not on any statement in the application, but the policy was treated as the entire contract between the parties.

The Pennsylvania Act of May 11, 1881 (P. L. 20), in Sec. 1 provides:

> "All life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to the said policies, correct copies of the application as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between the parties."

In Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460, 12 Atl. 668, 673, the court said in construing this Pennsylvania statute:

> "The application was rightly excluded from the testimony. The provisions of the Act of 11th of May, 1881 (P. L. 20), are conclusive on this point. No copy of the application or the by-laws of the company was

attached to the policy as the Act requires. It constituted, therefore, no part of the policy, or of the contract between the parties, and was not receivable in evidence. The case is to be considered as if no such paper existed."

The other cases mentioned from Pennsylvania by the petitioner, namely, Panopoulos, Extr. v. Metropolitan Life Ins. Co., 96 Pa. Sup. Ct. 325, and Hood v. Prudential Insurance Co., 22 Pa. Sup. Ct. Rept. 244, held that defense could be made on provisions in the policy which was the entire contract between the parties, but not on any thing contained in the application not attached to the policy because by the Act the application was no part of the contract between the parties.

Washington statute:

Section 7075 Rem. Comp. Stat. provides:

"Every contract of insurance shall be construed according to the terms and conditions of the policy, except when the contract is made pursuant to a written application therefor, and such application is intended to be made a part of the insurance contract, and the insurance company making such insurance contract, unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon such application shall become a part of the insurance contract, and failing so to do, it shall not be made a part of the insurance contract."

Wisconsin statute, Section 1945a provides:

"All fire insurance corporations, except town insurance companies, shall upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representations of the assured; which by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to herein, or which may in any manner effect the validity of such policy. The omission to do so shall not render the policy invalid; but if any corpora-

tion neglects to comply with the requirement of this section, it shall forever be precluded from pleading alleging, or proving such application, or representation, or any part thereof in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such corporation either to plead or prove such application or representations, *but may do so at his option.*" Lumbar vs. Ins. Co., 72 Wis. 492, 40 N. W. Rep. 386.

In Wilcox vs. Continental Ins. Co. of New York, 85 Wis. 193, 55 N. W. 188, in the policy itself there was a provision that the policy should be void, if there was any other insurance on the stallion insured or a chattel mortgage on him. There was apparently no written application for the insurance and the agent for the company did not ask about same. The court held that the company could prove the chattel trust and other insurance to defeat the suit on the policy. This is the case quoted by petitioner.

Iowa statute, provides:

"Section 1741. Copy of Application,—

"All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon, a true copy of any application or representation of the assured which by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid; but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving any such application or representations or any part thereof, or falsity thereof, or any part thereof, in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representations, *but may do so at his option.*"

In MacKinnon vs. Mutual Fire Ins. Co., 89 Iowa 170, 56 N. W. 423, cited by the petitioner the court was construing this Iowa statute and held that notwithstanding no copy of the application had been attached the provision in the policy to the effect that the policy should be void, if the ground on which it stood was less than a fee simple title in the insured, allowed the company to show by way of defense that the insured had less than a fee-simple title.

In Kirkpatrick v. London Guarantee & Accident Co., 139 Iowa 370, 115 N. W. 1107, 19 L. R. A. (N. S.) 102, cited by the petitioner the court was also construing this Iowa section. There was no application attached but the defense was on a provision contained in the policy itself and the court allowed the evidence to be received showing the policy void thereunder. The court in the opinion says as to this section, "The section of the code which we are now asked to interpret has frequently been considered by this Court, and has been liberally applied in excluding an insurance company from relying in any way upon representations or warranties contained in an application, a copy of which has not been incorporated into or attached to the policy; and the purpose of the statute has been declared in a general way to be the prevention of any representation or warranties in the application becoming considered a portion of the contract, or available to the company as a defense, unless a copy of the application is incorporated or attached." "An evident purpose of this statute is that, when the application is made a part of the contract—a true copy must be attached to the policy, so that the writing composing the contract may all appear together, and that the insured may be in possession of the evidence of which his contract is. Johnson v. Des Moines L. Inc. Co., 105 Iowa 273, 75 N. W. 101."

SUMMARY.

Under the several state statutes quoted above, the law is as follows:

(1)

In Massachusetts, Kentucky, Pennsylvania and Washington state, if the copy of the application is not attached same forms no part of the contract of insurance at all.

(2)

In Mississippi, if the copy of the application is not attached, the company is not permitted to deny any statements in the application to be true.

(3)

In Wisconsin and Iowa, if the application is not attached it is no part of the contract so far as the company is concerned and cannot be used in any way as a defense by the company, *but the insured may make use of it at his option.*

(4)

In the District of Columbia the statute says the insurance company "shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of anything contained in or omitted from such application."

Mr. Justice Hitz in delivering the opinion of the Court of Appeals in this case said:

> "That policies of life insurance are issued upon applications containing applicant's version and representations as to those matters and things is common knowledge.

"To the end that he, his beneficiary, and if need be, the courts, might see exactly what he said in that connection, the statute provides that he, as well as the company, shall possess the entire contract. (Metropolitan Life Ins. Company v. Burch, 39 App. D. C. 405.)

"And to accomplish that purpose it provides that unless the company delivers with the policy a copy of the application, no defense shall be allowed to such policy on account of any thing contained in or omitted from the application.

"That the defense in this case is upon something contained in or omitted from the application, there can be no doubt."

The material difference between the statutes of the several states quoted and our local statute applicable to the District of Columbia only is this: The state statutes declare that if the application is not attached *it shall not be a part of the contract between the parties.* All of the quoted statutes provide that if a copy of the application is not attached the company may make no defense on any thing contained in the application; and only Wisconsin and Iowa allow the insured to make use of the statements in the application where the company has failed to attach a copy thereof to, and deliver it to the insured with the policy. The District of Columbia statute we claim makes the application and policy the whole contract between the parties and if the company fails to attach a copy of the application to and deliver it with the policy to the insured, in default thereof no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application. It may be that the statute would have been complete by stopping with a period after "such policy" and that "on account of anything contained in, or omitted from such application" was merely added by way of emphasis. This local statute is the only one found providing that if no copy of the application is attached no defense may be permitted on account of any thing *omitted from such application.*

Any defense that might be made to the policy would necessarily be upon something contained in or omitted from the application as was said by Mr. Justice Hitz delivering the opinion of the Court of Appeals in this case.

We respectfully submit that the decision of the Court of Appeals in this case should be affirmed.

W. Gwynn Gardiner,
George A. Maddox,
Attorneys for Respondent.

FILE COPY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [redacted] 22

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, A CORPORATION, PETITIONER,

vs.

WINNIE BURTON.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ AND BRIEF IN SUPPORT THEREOF.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Counsel for Metropolitan Life Insurance Company, The Prudential Insurance Company of America and the John Hancock Mutual Life Insurance Company, as Amici Curiæ.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ.

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WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, A CORPORATION, PETITIONER,

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WINNIE BURTON.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the Metropolitan Life Insurance Company, The Prudential Insurance Company of America and the John Hancock Mutual Life Insurance Company, respectfully move this Honorable Court for leave to file as *amici curiæ* the accompanying brief in support of the petition for writ of certiorari.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,

Counsel for Metropolitan Life Insurance Company, The Prudential Insurance Company of America and the John Hancock Mutual Life Insurance Company, as Amici Curiæ.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, A CORPORATION, PETITIONER,

vs.

WINNIE BURTON.

BRIEF OF METROPOLITAN LIFE INSURANCE COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, AS AMICI CURIÆ.

I.

Preliminary Statement.

Metropolitan Life Insurance Company, The Prudential Insurance Company of America and John Hancock Mutual Life Insurance Company are corporations doing a life insurance business in the District of Columbia, and are interested in the litigation involved in this case by reason of the fact that they have issued and there are now outstanding in the District of Columbia, approximately four hundred fifty thousand of what are termed "industrial" life insurance policies, involving more than eighty-two millions of dollars. These

policies contain the whole contract of insurance between the insurer and the insured and expressly so provide; but no copy of the application made by the insured, if any, was delivered with or is attached to any of such policies. And there is now pending in the Municipal Court of the District of Columbia a suit or suits based upon such a policy or policies, involving the same questions of law and the same, or similar, facts as those involved in this case, as to which the defendant company, because of failure to deliver with the policy sued on a copy of the written application therefor made by the insured, is, by the decision of the Court of Appeals of the District of Columbia in this case, construing Section 657 of the Code of Laws for said District, denied the right to make any defense therein based solely upon and available to it under the terms, stipulations and conditions of the policy itself.

The effect of this decision is to make every such policy incontestable from the date of its delivery to the insured, even in cases where the policy may have been obtained by fraud, or in cases where the insured, between the date of the application and the date of the policy or of its delivery, may have undergone a material change in his physical condition from sound to unsound health, of which he is aware, without disclosing such change to the Company as in duty bound so to do. (*Stipcich* v. *Insurance Co.*, 277 U. S., 311, 317.)

The sole question involved in this case is:

Does this statute prohibit a life insurance company doing business in the District of Columbia from making

any defense to a suit upon a policy, based solely upon the terms, and conditions of the policy, if no copy of an application therefor made by the insured is delivered with the policy?

The question here presented is one of substance relating to the construction of a statute of the United States, applicable to the District of Columbia, which, although presented to this Court in the case of *Supreme Council* v. *Behrend,* 247 U. S., 394, was not decided, and has not since been, but should be settled by this Court; and is an important question in the law of life insurance not only to a large number of life insurance companies doing business in the District of Columbia and in many of the States having similar statutes, but also to the many hundreds of thousands "industrial" policy holders in the District of Columbia by reason of increase in the expense of conducting the business of life insurance necessitated by this decision which in effect requires that such contracts of life insurance shall be evidenced by two documents,—the policy and a copy of the application therefor, notwithstanding the policy itself contains the whole contract of insurance between the parties.

II.

ARGUMENT.

The Decision Below is Contrary to and in Conflict With Prior State Decisions.

The record shows that the petitioner, without delivering a copy of the application made by the insured,

issued its policy of life insurance, dated December 12, 1927, which itself contains all the terms, stipulations and conditions of the contract of insurance between the parties, including a provision that "this policy constitutes the entire agreement between the Company and the Insured and the Holder and Owner hereof. Its terms cannot be changed, or its conditions varied, except by the express agreement of the Company evidenced by the signature of its President or Secretary." The policy contains no reference to an application therefor as part of the contract of insurance or as having any bearing thereon; nor are there any endorsements on the policy with respect to changing its terms or varying the conditions therein contained.

The policy involved in this case contains the provision that "If, (1) the insured is not alive or is not in sound health on the date hereof; * * * then in any such case, the Company may declare this policy void and the liability of the Company, in the case of any such declaration or in the case of any claim under this policy, shall be limited to the return of premiums paid on the policy, except in the case of fraud, in which case all premiums will be forfeited to the Company."

The defendant below offered proof that the insured was not in sound health at or before the issuance of the policy, and such proof was rejected because a copy of the application had not been attached to and delivered with the policy.

This ruling was based upon Section 657 of the Code of Laws for the District of Columbia, which provides that:

> "Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application."

In its interpretation of this statute, the prior decisions of the Court of Appeals of the District of Columbia are in harmony with the decisions of the State Courts, construing similar statutes, in holding that the penalty imposed by the statute applies to an action on a policy of life insurance where a full copy of the application is not delivered with the policy and the defense is based upon the falsity of some statement, representation or warranty contained in the application. (*Met. Life Ins. Co.* v. *Hawkins,* 31 App. D. C., 493-496; *Met. Life Ins. Co.* v. *Burch,* 39 App. D. C., 397-405; *Brotherhood of R. Trainmen* v. *Groves,* 48 App. D. C., 151.) But with respect to the question here involved its decision in this case is not only contrary to and in conflict with prior decisions of the State Courts which have considered and passed upon this question; but, in interpreting the statute as requiring the contract of insurance to be evidenced by two documents,—the policy and a copy of the application therefor,—notwithstanding the policy sued on embodies the contract in its entirety and was so accepted without objection by the insured, the decision would seem to be contrary to and in conflict with its prior decision in

Brotherhood of R. Trainmen v. *Groves, supra,* 154, wherein the Court, in not permitting a defense based upon the constitution, by-laws, rules and regulations of the insurer, which by reference in the policy were made a part of the contract of insurance without delivering copies thereof with the policy, says:

> "The manifest purpose of Congress in adopting it (Sec. 657) was to compel insurance companies, whether old line or fraternal, to state the entire contract *either in the policy or the policy and application,* so that the insured would be able to find the terms defining his obligations and rights as a policy holder in not more than two papers. But for this provision he might be compelled to search through upwards of a hundred pages of printed rules and regulations, most of which had no bearing whatever upon his rights, to ascertain the complete terms of his contract" (Italics ours).

The effect of the decision in this case is to make, contrary to public policy, every such policy as herein involved incontestable from its date and thereby preclude the insurer company from making any defense whether based upon fraud in the procurement of the policy or otherwise, or for breach of condition as to sound health on the date of the policy, or for breach of other conditions contained in the policy itself, upon the existence of which the validity of the policy is dependent.

The Court in the case of *Mass. Life Asso.* v. *Robinson,* 104 Ga., 256, 271, says:

> "If, however, the policy stipulated that it should be incontestable from its date, and the

> insurer should not be allowed any defenses, whether originating in fraud or otherwise; or if it were clear from the terms of the contract that it was the intention of the parties that fraud should not be a defense, then such a contract would be void as against public policy."

The decision in the above quoted case is cited with approval in *Reagan* v. *Union Mut. Life Ins. Co.*, 189 Mass., 555, 557; and *Continental Casualty Co.* v. *Owen*, 38 Okla., 107, 121. See also *Ritter* v. *Mut. Life Ins. Co.*, 169 U. S., 139, 154.

In a number of State decisions, it is held that such statutes do not prevent the insurer from showing that the insured was not in sound health when the policy was delivered, or from showing breach of other conditions contained in the policy. (*MacKinnon* v. *Mut. Fire Ins. Co.*, 89 Ia., 170, 174; *Kirkpatrick* v. *London Guar. & Accid. Co. Ltd.*, 139 Ia., 370, 375; *Wilcox* v. *Continental Ins. Co.*, 85 Wis., 193, 198; *Western & Southern Life Ins. Co.* v. *Webber*, 183 Ky., 32, 38; *Connell* v. *Met. Life Ins. Co.*, 16 Pa. Superior Ct. Rep., 520, 529; *Hood* v. *Prud. Ins. Co.*, 22 Pa. Superior Ct. Rep., 245, 249; *Panapoulous* v. *Met. Life Ins. Co.*, 96 Pa. Superior Ct. Rep., 325, 328-9; *Wash. Fire Relief Assn.* v. *Albro*, 130 Wash., 114, 116; *Met. Life Ins. Co.* v. *Scott, Admr.*, 160 Miss., 537, 545.)

The language of the above quoted provision of the policy, upon which the defense in this case is based, is clear and free from ambiguity. It requires the existence of sound health on the date of the policy as a condition precedent to the validity of the contract of insurance. To relieve the insured from the legal con-

sequences of this explicit condition of the policy by precluding the Company from *making the defenses sought to be made in this case* "would be to vary the plain terms of a contract in utter disregard of long settled principles." (*Bergholm* v. *Peoria Life Ins. Co.*, Adv. Op., Sup. Ct., U. S., Vol. 7, 306, 308.)

In the case of *Connell* v. *Met. Life Ins. Co., supra,* at page 529, the Court says:

> "It must not be forgotten, however, there is a difference between obtaining a contract through a misrepresentation as to a fact, and making the existence of that fact a condition upon which the contract, by its terms, is dependent.
>
> "The insurance company having, by its express contract, waived the warranties contained in the application, sought to protect itself by incorporating certain conditions into the contract. A part of the agreement between the parties was, 'This policy is void if the insured before its date has been rejected for insurance by this or any other company, or has been attended by a physician for any serious disease or complaint, or has had before this date any pulmonary disease, or chronic bronchitis, or cancer, or disease of the heart, liver or kidneys.' These were unequivocal absolute covenants. Whether the policy was void was dependent upon actual conditions, past or present, and not upon the knowledge of those conditions possessed by the parties. The Act of June 23, 1885, relates 'to warranties in the applications for life insurance policies' and has not application to the express covenants of the policy itself, not directly dependent upon such warranties. The defense in this action was that the assured, prior to and

> at the time of the issuance of the policy, had Bright's disease of the kidneys, and that she continued to suffer from and died of that disease. If this was true, the express covenant of the parties, hereinbefore recited, cannot be disregarded, and the policy was void" (Cases).

And the law seems to be settled by the decisions construing somewhat similar statutes that, for failure to deliver with the policy a copy of the application, the case is to be considered and disposed of as if no such paper existed. (*Moore* v. *Bestline,* 23 Pa. Superior Ct. Rep., 6, 12; *Imperial Fire Ins. Co.* v. *Dunham,* 117 Pa. 460, 473; *Rauen* v. *Prud. Ins. Co.,* 129 Ia., 725, 731.)

The Mississippi statute (Sec. 5174, Code of 1930) provides that for default in the delivery of a copy of the application with the policy, the life insurance company "shall not be permitted in any Court of this State to deny that any of the statements in said application are true." The Supreme Court of Mississippi in construing this statute in the case of *Met. Life Ins. Co.* v. *Scott, Admr., supra,* at page 545, which involved substantially the same questions of law based upon substantially the same facts as are involved in this case, says:

> "The policy was complete in itself, and purports to contain in plain language all the terms, conditions and stipulations of the contract, and we do not think the Company is precluded from relying on the express conditions and stipulations appearing on the face of the policy, by reason of the fact that the application contained representations or stipulations in reference to

the same subject matter. When the Company chose to ignore the statements and representations appearing in the application, and incorporated in the policy in plain terms the conditions and stipulations upon which its validity should rest, and the policy was accepted by the insured as constituting a contract, it had the right to make any defense it might have under the terms of the policy, without reference to the application."

III.

The Statute is Clear and Unambiguous and Within the Constitutional Authority of Congress.

Prior to the enactment of this statute, the terms, stipulations and conditions of the entire contract of insurance were usually contained in the policy and in the application of the insured; and the rule established by the decisions permitted an insurance company in a suit on a policy issued by it to rely upon the written application made for the policy, or upon some by-law, constitution, rule or regulation of the company, forming a part of the contract of insurance or having some bearing thereon, without incorporating in, attaching to, or delivering with the policy a copy or copies thereof.

Obviously the purpose of this and similar State statutes, and the manifest intention of Congress in the enactment of the statute for the District of Columbia, was to change this rule and thereby to prevent the insured and others interested in the policy from being taken by surprise and being bound by something contained in the application, or other documents, forming

by reference a part of the contract of insurance, but not placed in the possession of the insured. (*Supreme Council* v. *Behrend*, 45 App. D. C., 260, 270 and 275; *Western & Southern Life Ins. Co., supra*, 35; *Rauen* v. *Prud. Ins. Co., supra*, 732.)

There is no requirement in the statute respecting the mode or manner in which contracts of life insurance shall be made; nor is there any prohibition against the whole of such a contract being embodied in the policy itself. Nevertheless, the Court of Appeals in this case interprets the statute as requiring that the "whole contract" may not be contained in the policy, but that it must be contained in the policy *and* in the application made by the insured, otherwise the insurer is without defense to a claim.

The duty imposed on the Company by this statute is to deliver into the possession of the insured the written evidence of the contract "so that the whole contract may appear," with a penalty for default in the performance of this duty by the Company. Therefore, if the policy as issued by the Company and accepted by the insured contains, without reference to the application or to any other document as forming a part thereof or having any bearing thereon, the "whole contract" of insurance between the parties, the duty imposed upon the Company has been complied with and the statute has no application. In such case, delivery with the policy of a copy of the application or of any other document would serve no purpose and would be an unnecessary and useless thing.

The default specified in the statute for which the penalty is imposed is the failure on the part of the Com-

pany to deliver to the insured written evidence of the "whole contract" of insurance, including a copy of the application where it forms a part thereof. The penalty for such default is limited to a denial to the Company to make any defense to the policy based upon "anything contained in or omitted from the application," but where the application forms no part of the contract which is contained in its entirety in the policy, and accepted by the insured, then there is no reason, or justification under the statute, for imposing the penalty. Moreover, the penalty does not apply in this case, for the defense sought to be made was not "on account of anything contained in or omitted from such application," but was based *solely and exclusively upon the terms and conditions of the policy itself without reference to any application.*

Conclusion.

It is respectfully submitted that in this case the Court of Appeals of the District of Columbia erred in its application and interpretation of Section 657 of the Code of Law for the District of Columbia, since

(*a*) the purpose of Congress in the enactment of this Statute was satisfied by placing before the insured in the policy itself the entire contract of insurance, and

(*b*) the defense offered by the insurance company in this case was not a defense "on account of anything contained in, or omitted from" the application of the insured.

Therefore, neither the intent nor the letter of the Statute requires the rejection of the proof offered by

the insurance company in the defense of the claim in suit.

Wherefore, the undersigned, as Amici Curiæ, on behalf of the Metropolitan Life Insurance Company, The Prudential Insurance Company of America and the John Hancock Mutual Life Insurance Company, respectfully pray that this Court will grant the writ of certiorari herein prayed for by petitioner, to the end that this case may be reviewed and determined by this Court, as provided by law; and that the judgment herein of the Court of Appeals of the District of Columbia be reversed by this Honorable Court.

Respectfully submitted:

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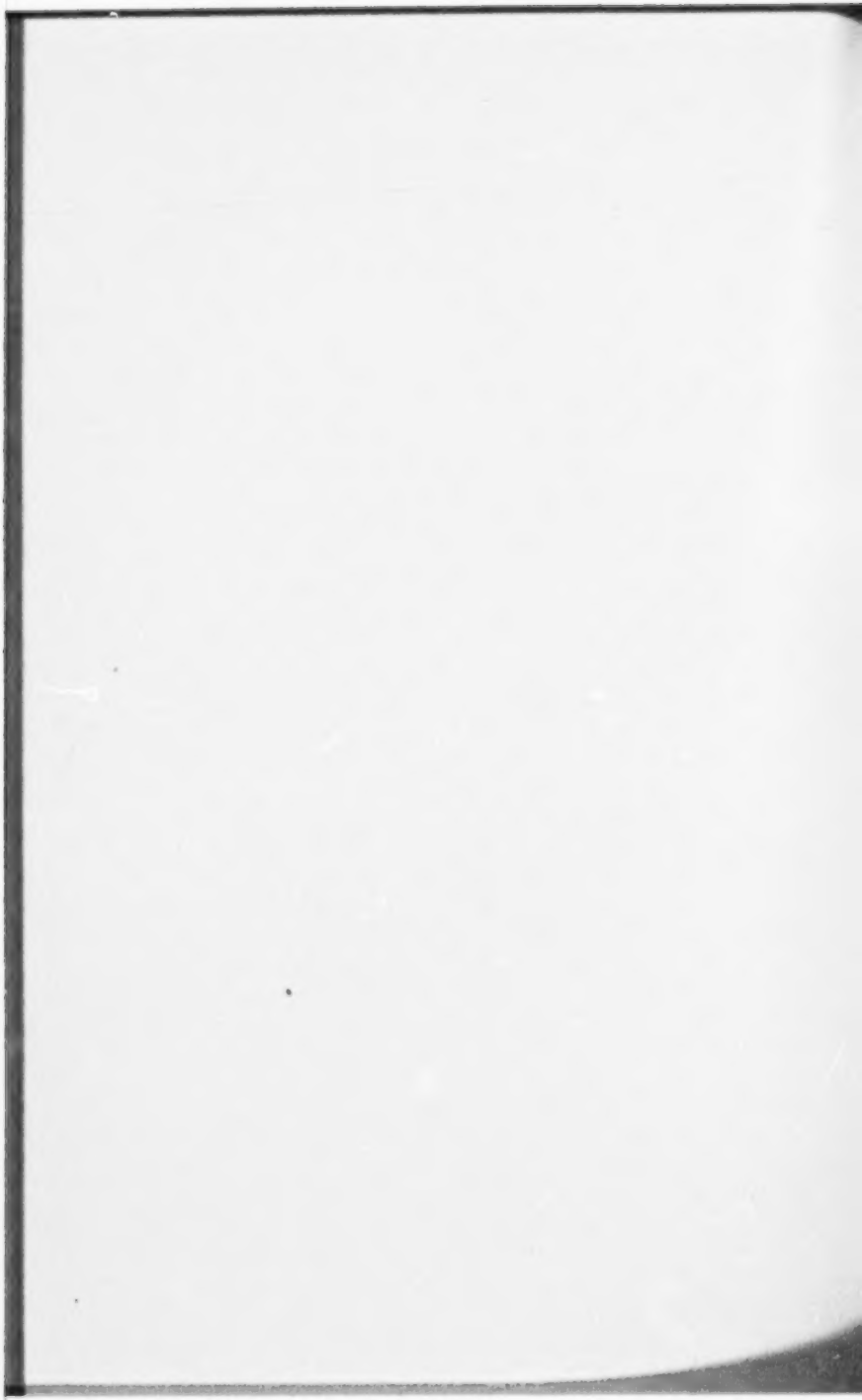
Counsel for Metropolitan Life Insurance Company, The Prudential Insurance Company of America and John Hancock Mutual Life Insurance Company, as Amici Curiæ.



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SUPREME COURT OF THE UNITED STATES.

No. 22.—October Term, 1932.

Washington Fidelity National Insurance Company, Petitioner, *vs.* Winnie Burton.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[November 7, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent sued in the municipal court of the District of Columbia to recover the amount of an insurance policy issued by petitioner December 12, 1927, on the life of her husband who died May 22, 1929. The policy was delivered to the insured and all premiums were paid in the District of Columbia where he lived. Adequate proof of death, plaintiff's demand for payment and defendant's refusal to pay were conceded. The policy contained these provisions: "This Policy constitutes the entire agreement between the Company and the Insured and the holder and owner hereof. . . . If the Insured . . . is not in sound health on the date hereof . . . the Company may declare this Policy void . . ." Section 657 of the District Code (Act of March 3, 1901, 31 Stat. 1294, as amended by Act of June 30, 1902, 32 Stat. 534) provides: "Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application." The company did not deliver with the policy or otherwise a copy of an application therefor. Indeed, there was no evidence that any had been made. Defendant offered evidence to show that, at the date of the issue of the policy, the insured was not in sound health. Plaintiff objected on the ground that no copy of the application was delivered with the policy. The court, relying on the statute, sustained the

objection and refused to permit defendant to interpose that defense and gave judgment for plaintiff. The Court of Appeals affirmed. 56 F. (2d) 300.

The sole question is whether § 657 was rightly construed.

The Court of Appeals assumed as a matter of common knowledge that life insurance policies are issued on written applications and that in this case one had been made by the insured. Without deciding whether that assumption is warranted, we shall consider the case as if it were shown that the assured applied in writing for the insurance in question. In the absence of a statute forbidding it, contracts of insurance may be made orally. *Relief Fire Ins. Co.* v. *Shaw*, 94 U. S. 574. There is no such prohibition in the District of Columbia. In § 657 the word "policy" and the phrase "a copy of the application" plainly indicate that writings are meant (*Trustees of the First Baptist Church* v. *Brooklyn Fire Ins. Co.*, 19 N. Y. 305, 308), and that the statute does not extend to oral applications. The construction generally put upon enactments like the one before us indicates that the principal if not the only purpose is that, if there be an application, a copy of it shall be attached to or otherwise delivered with the policy so that the documents showing the entire agreement shall be made available to the insured.* That serves to guard the insured against misunderstanding as to his contract and, in case of controversy with the company, to protect him against surprise, inconvenience and danger of injustice liable to arise where the policy does not contain the entire agreement and refers for parts of it to applications or other papers. That purpose is reflected clearly by the clause that, in default of the required delivery of a copy of the application, no defense shall be allowed to such policy on account of anything "contained in, or omitted from, such application". And the barring of such defenses is the only consequence declared to result.

Here the policy definitely declares that it constitutes the entire agreement between the parties. The defense interposed is based solely on one of its provisions and has no relation to the applica-

*MacKinnon & Co. v. Mut. Fire Ins. Co., 89 Ia. 170. Ranen v. Insurance Co., 129 Ia. 725. Kirkpatrick v. Accident Co., 139 Ia. 370. Lenox v. Insurance Co., 165 Pa. 575. Washington Fire Relief Ass'n v. Albro, 130 Wash. 114. Metropolitan L. Ins. Co. v. Scott, 160 Miss. 537.

tion. The section does not require written applications to be made or declare that, where one is made but not delivered with the policy, there shall be no defense based on the provisions of the policy itself. And no reason is suggested in support of a construction of the section that would prevent defense based on a provision of the policy even though a similar or the same provision were contained in an application. As this policy expressed the entire agreement defendant, notwithstanding its failure to deliver a copy of the application, was entitled to interpose such defenses as would have been open to it if no application had been made. *MacKinnon & Co.* v. *Mut. Fire Ins. Co.*, 89 Ia. 170, 173. *Imperial F. Ins. Co.* v. *Dunham*, 117 Pa. 460, 473. It follows that § 657 furnishes no support for the refusal of the trial court to permit defendant to show that the insured was not in sound health when the policy was issued. .

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 22.—October Term, 1932.

Washington Fidelity National Insurance Company, Petitioner, *vs.* Winnie Burton.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[November 7, 1932.]

Mr. Justice Stone.

If an insurance policy is issued on written application and the company fails to deliver a copy of it to the insured, along with the policy, the District statute, in terms, provides that "no defense shall be allowed to such policy on account of anything contained in or omitted from the application". In this case it does not appear that there was any written application, and as the defense was based on a clause contained in the policy, which purported to embody the "whole contract," no case was presented calling for the application of the statute, or which would enable a court to say just what force should be given to its prohibition in a case where the written application, not delivered with the policy, is in evidence. For that reason the case should be reversed ~~or dismissed~~.

I think it should be dismissed. The certiorari was granted upon a petition which set forth as grounds for its allowance that the court below, in construing the prohibition of the statute, had "decided erroneously a question of general importance" and that the decision "is in conflict with all decisions in other jurisdictions involving similar statutes and therefore tends to unsettle the law". Upon the briefs and the argument the statutes of many states were quoted, prescribing the legal consequences of the failure of the insurer to deliver to the insured, with the policy, a copy of the written application. Most of them provide only that in such cases the application is not to be considered a part of the policy or received in evidence in a suit brought upon it. None contain language like that of the present statute prohibiting any defense

> if it is not for other reasons, to be dismissed.

on the policy "on account of anything contained in or omitted from" the application, and we have been cited to no decision of any court outside the District of Columbia in which that language or any resembling it has been considered.

It thus appears that the construction of the statute which we were asked to review is not in the case, and even if it were, it is of local significance only. The conflict of decisions asserted is not shown. Plainly the question is not of such general interest or importance as under the rules and practice of this Court warrants its review upon certiorari. For these reasons it is the duty of this Court to dismiss the writ as improvidently granted. *Tyrrell* v. *District of Columbia,* 243 U. S. 1; *Southern Power Co.* v. *Public Service Co.,* 263 U. S. 508; *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440; *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387; *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association,* 242 U. S. 430.

If the writ is not to be dismissed and the case is to be decided on the construction of the statute, the Court's reversal of the judgment, in the absence of the application which, for purposes of decision, it assumes to exist, can only proceed on the ground that under no circumstances could a defense based on a clause in the policy itself be said to be one "on account of anything contained in or omitted from the application". With that conclusion I am unable to agree. The defense here was that the insured was not in sound health at the date of the policy. Petitioner sought to establish it by showing that the state of health of the insured, then deceased, had been bad for several years before the policy was issued. If the written application were before the Court and revealed that the insured had been asked about his condition of health and had either answered fully and truthfully, or not at all, it would show, I think, that the defense, within the very meaning and purpose of the statute, was "on account" of something "contained in or omitted from the application", and that the petitioner was precluded from making it.

Mr. Justice BRANDEIS concurs in this opinion.